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GENERAL AVERAGE

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PRINCIPLES AND PRACTICE IN THE UNITED STATES OF AMERICA

BY

ERNEST W. CONGDON

AVERAGE ADJUSTER

MEMBER OF THE ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES

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PREFACE

It has been the aim of the writer, in compiling this handbook, to give shipowners, merchants, and others interested in shipping a brief outline of the established principles of General Average in the United States and of the manner in which claims of that nature are in practice dealt with. To those advanced in knowledge of the subject it may, at least, serve as a handy reference or digest of cases arranged under appropriate headings. Those who wish to make a thorough study of this important branch of the maritime law must be referred to the text books and to the numerous decisions of the Courts, as only some of the leading Federal cases and others are cited herein, more particularly those of interest and importance which have been adjudicated in the past thirty years, the law during this period having undergone considerable development.

The most frequently occurring instances of general average are touched upon in the different chapters, sufficiently, it is hoped, to give a reasonably clear idea of their treatment, it being impracticable in a small work of this kind to specify all their varying phases.

Before proceeding further it will be well for the reader to divest his mind of any erroneous impression which he may have gathered that General Average has any necessary connection with or is dependent upon Insurance, and he should remember that the law of General Average had its foundation in *equity,* and that its elementary principles were practised long before insurance was introduced. It applies only to *shipping,* and is a part of the

established law of the sea, as distinguished from the law of the land.

General Average, the doctrine of which is part of the maritime law of all nations, and to which government property, as well as private property is subject, *is not dependent upon contract,* although the rights to it can be varied by contract. It rests upon the equitable principle that whatever voluntary loss is sustained for the benefit of all parties to a common maritime adventure must be borne by all in proportion as those interested are benefited.

It is, however, a *sine qua non* that the party claiming contribution in general average must come "with clean hands" (i. e., without fault) to be able to enforce it, this rule being founded on the time-honored principle in law that the wrongdoer cannot derive any benefit at the expense of those who are innocent. The claimant, to be successful, must either be innocent, or be made so, in the eyes of the law, by valid contract, if negligence of his servants is involved.

To his associate, Mr. Joseph C. Hughes, the writer desires to express his thanks for many valuable suggestions in connection with the preparation of this work.

Ernest W. Congdon.

New York, January, 1913.

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The Circuit Court of Appeals in the case of the *Roanoke* said:

> "The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered into the general maritime law. It appears to have been preserved in England without enforcement by statute. It applies only to shipping, and prescribes that in all cases of imminent peril to the whole adventure, where release is obtained by intentional sacrifice of any part for the benefit of the residue, contribution shall be made by the saved portions for that which was so sacrificed. The common peril takes from the master of the vessel his paramount obligation to his vessel owners, and charges him with a joint agency for the owners of cargo and vessel, to act impartially, decide when a sacrifice is necessary, and select for sacrifice that which will best serve the interest of all to avoid the peril." (a)

The right to contribution does not necessarily cease when mere *physical safety* of the imperiled property has been procured. The courts of the United States have extended the doctrine of general average beyond this and hold, contrary in many instances to those of Great Britain and other countries, that the *mutual benefit* derived by vessel and cargo in having the voyage completed warrants allowance in general average of some of the consequential losses and damages sustained after the original peril has been averted, and even after vessel and cargo are in a port or place of safety. It must not be supposed from this, however, that all extra losses and damages are to be contributed for in general average merely because the voyage cannot be continued or completed without incurring them. Those incurred for the exclusive benefit of either vessel or cargo are chargeable directly to them, as, for instance, the cost of repairing damage to vessel sustained *in*voluntarily or the cost of reconditioning cargo made necessary owing to damage

(a) The *Roanoke*, Cir. Ct. of App. 59 Fed. Rep. 163 (1893).

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GENERAL AVERAGE

CHAPTER I

GENERAL PRINCIPLES

A General Average is a loss which arises in consequence of a voluntary and successful sacrifice, under extraordinary circumstances, of part of the property included in a common maritime adventure, solely for the benefit of the adventure as a whole at a time of peril threatening physical injury to the whole, or through reasonable extraordinary expenditure for the common benefit of the whole adventure, occasioned by a voluntary act.

Such loss is contributed to proportionately as the parties concerned are benefited, and it matters not, ultimately, whether vessel or cargo is called upon to suffer in the first instance for the common benefit, the loss by the sacrifice being equalized in the final adjustment, with the result that the owner of the property sacrificed is placed on an equality with those whose interests are saved intact.

In the leading and frequently cited case of the *Star of Hope* the United States Supreme Court stated as follows:

> "General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are

established law of the sea, as distinguished from the law of the land.

General Average, the doctrine of which is part of the maritime law of all nations, and to which government property, as well as private property is subject, *is not dependent upon contract,* although the rights to it can be varied by contract. It rests upon the equitable principle that whatever voluntary loss is sustained for the benefit of all parties to a common maritime adventure must be borne by all in proportion as those interested are benefited.

It is, however, a *sine qua non* that the party claiming contribution in general average must come "with clean hands" (i. e., without fault) to be able to enforce it, this rule being founded on the time-honored principle in law that the wrongdoer cannot derive any benefit at the expense of those who are innocent. The claimant, to be successful, must either be innocent, or be made so, in the eyes of the law, by valid contract, if negligence of his servants is involved.

To his associate, Mr. Joseph C. Hughes, the writer desires to express his thanks for many valuable suggestions in connection with the preparation of this work.

ERNEST W. CONGDON.

New York, January, 1913.

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act of others, whether private persons or public authorities. (a)

In the case of *Ralli v. Troop* the Supreme Court said:

> "Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the necessity of the case, or as exercising a power and duty imposed upon him by the law as incident to his office—whatever may be considered the source of his authority—the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, appertain to the master of the vessel, magister navis, as the person intrusted with the command and safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority. In case of the master's death, disability, or absence, no doubt the mate or other chief officer of the vessel may succeed to the authority of the master in this as in other respects."

The fact that a vessel undertakes for a stipulated amount of freight to carry cargo from one port to another is no answer to the shipowner's claim for contribution in general average if the peril which gave rise to the sacrifice or expenditure was not contemplated, nor brought about by her unseaworthiness or by negligence. Unseaworthiness caused by perils of the sea during the voyage does not, of course, prejudice the claim for contribution.

It will be seen in the next chapter, however, that a shipowner may, *when there is a special provision in the contract of affreightment,* be entitled to contribution from the cargo owner notwithstanding that the peril to avert which the sacrifice was made, or expenditure incurred, arose from unseaworthiness or negligence of his servants. Even then he must show that he used due

(a) Wamsutta Mills v. Old Colony Steamboat Co., Sup. Ct. Mass. 137 Mass. 471 (1884).

Ralli v. Troop, U. S. Sup. Ct. 15 Sup. Ct. Rep. 657 (1895).

diligence to make the vessel in all respects seaworthy, and properly manned, equipped and supplied. (a)

The test of seaworthiness of a vessel in respect of cargo is whether she is reasonably fit to carry it (b), and she must be so tight, staunch and strong as to be able to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo. (c) A vessel must be seaworthy at time of *sailing* and not merely when she begins to load cargo. (d) (*post*, p. 20.)

In a recent case the Court stated:

> "There can be little question that a vessel seaworthy as to navigation may be unseaworthy as to cargo. So a ship may be seaworthy as to one part of the cargo and unseaworthy as to another. The warranty of seaworthiness extends, not alone to the vessel, but also to its reasonable and suitable adaptability and fitness to carry each particular article well known to commerce. Especially would this be so where the article is one carried in the usual course upon the sea or navigable waters. The term "seaworthy" in its earlier use, it must be admitted, was not of as broad or extended significance as under the present advanced state of commerce and transportation facilities; but it now has relation to the article carried, and the different compartments of the ship and their particular use as well as to the navigability of the ship." (e)

An important ruling of the Supreme Court in the matter of seaworthiness was as follows:

> "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or

(a) The *Jason*, U. S. Sup. Ct. 32 Sup. Ct. Rep. 560 (1912).

(b) The *Silvia*, U. S. Sup. Ct. 19 Sup. Ct. Rep. 7 (1898).

(c) Dupont de Nemours & Co. v. Vance, U. S. Sup. Ct. 19 Howard 162 (1856).

(d) Bowring v. Thebaud, Cir. Ct. of App. 56 Fed. Rep. 520 (1892).

(e) The *Indrapura*, Dist. Ct. Ore. 178 Fed. Rep. 591 (1910).

shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." (a)

If *unseaworthiness* is alleged by cargo owners as a defense to the shipowner's claim for contribution, and the shipowner can present a *prima facie* case to the contrary, the burden of proof then rests upon the former to establish their contention, under the primary rule in pleading that what is averred must be proved.

Negligence has been defined to be:

"The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined, in all cases, by reference to the situation and knowledge of the parties, and all the attendant circumstances. The law does not charge culpable negligence upon any one who takes the usual precautions against accident which careful and prudent men are accustomed to take under similar circumstances." (b)

The following is a dictum of the Supreme Court:

"It is quite true that negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. This principle nowhere has been more fully recognized than by this court. (Lawrence v. Minturn, 17 How. 100, 110. The *Star of Hope*, 9 Wall. 203.) But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned." (c)

If *negligence* is alleged and interposed by cargo owners as a defense to the shipowner's claim for contribu-

(a) The *Edwin I. Morrison*, U. S. Sup. Ct. 14 Sup. Ct. Rep. 833 (1894). The *Caledonia*, U. S. Sup. Ct. 15 Sup. Ct. Rep. 537, (1895).

(b) Crandall v. Goodrich Transp. Co., Cir. Ct. Wisc. 16 Fed. Rep. 75 (1883).

(c) Oceanic Steam Nav. Co. v. Aitken, U. S. Sup. Ct. 25 Sup. Ct. Rep. 317 (1905).

tion the same principles would apply in the matter of burden of proof as with unseaworthiness (*supra*).

In the case of the *Montana* the Court stated as follows:

> "It will not be sufficient to show an error of judgment on the part of the master, either in selecting one of two courses open to be pursued by him, or in coming to one rather than another of two conclusions possible to be drawn from the facts as known, or as they ought to have been known by him. He must be proved to have displayed a want of reasonable care and skill in view of the facts as they appeared, or ought to have appeared to him." (a)

There can hardly be found a more clear and comprehensive statement of the duties and powers of the master, when a common danger threatens vessel and cargo, and in respect of his election as to the measures adopted to avoid it, than that contained in the judgment of the Supreme Court in the case of the *Star of Hope:*

> "Masters are often compelled, in the performance of their duties, to choose between the probable consequences of imminent perils threatening the loss of the ship, cargo, and all on board, and a sacrifice of some portion of the associated interests in their custody and under their control, as the only means of averting the dangers of the impending peril in their power to employ. They must elect in such an emergency, and if they, in the exercise of their best skill and judgment, decide that it is their duty to lighten the ship, cut away the masts, or to strand the vessel, courts of justice are not inclined to overrule their determinations. Owners of vessels are under obligations to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. From the necessity of the case the law imposes upon the master the duty, and clothes him with the power, to judge and determine, at the time, whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder. Standing

(a) The *Montana,* Dist. Ct. N. Y. 17 Fed. Rep. 377 (1883).

upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted to his care, and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made." (a)

In the case of *Ralli v. Troop,* the Supreme Court said:

"The authority of the master may be treated as resting either on implied contract of the parties or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care. At the present day, since voyages are longer, and merchants seldom go with their goods, there is the greater reason that upon the captain, selected for his skill and courage, and for his fitness to command the whole adventure, and to decide promptly and justly in cases of emergency, and better acquainted than any one else with the qualities and condition of the ship and with the nature and stowage of her cargo, should rest the authority and the duty, in case of imminent peril, first taking such advice as he sees fit, to determine finally, so far as concerns the mutual relations of those interested in the maritime adventure, the time and the manner of sacrificing part of the adventure to secure the safety of the rest." (b)

Consultation between the master, officers and crew in respect of a voluntary sacrifice is not essential in order to make a case of general average, the Supreme Court in *Columbian Ins. Co. v. Ashby* stating as follows:

"A consultation with the officers may be highly proper in cases which admit of delay and deliberation, to repel the imputa-

(a) The *Star of Hope,* U. S. Sup. Ct. 9 Wallace 203 (1869).
(b) Ralli v. Troop, U. S. Sup. Ct. 15 Sup. Ct. Rep. 662 (1895).

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GENERAL AVERAGE

CHAPTER I

GENERAL PRINCIPLES

A General Average is a loss which arises in consequence of a voluntary and successful sacrifice, under extraordinary circumstances, of part of the property included in a common maritime adventure, solely for the benefit of the adventure as a whole at a time of peril threatening physical injury to the whole, or through reasonable extraordinary expenditure for the common benefit of the whole adventure, occasioned by a voluntary act.

Such loss is contributed to proportionately as the parties concerned are benefited, and it matters not, ultimately, whether vessel or cargo is called upon to suffer in the first instance for the common benefit, the loss by the sacrifice being equalized in the final adjustment, with the result that the owner of the property sacrificed is placed on an equality with those whose interests are saved intact.

In the leading and frequently cited case of the *Star of Hope* the United States Supreme Court stated as follows:

> "General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are

usually divided into two great classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.

"Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

"Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, but in order to constitute a basis for such a claim it must appear that the expenses or sacrifices were occasioned by an apparently imminent peril; that they were of an extraordinary character; that they were voluntarily made with a view to the general safety; and that they accomplished or aided at least in the accomplishment of that purpose.

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master; but the authorities, everywhere, agree that three things must concur in order to constitute a valid claim for general average contribution: First, there must be a common danger to which the ship, cargo, and crew were all exposed, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interest to save the remainder. Secondly, there must be the voluntary sacrifice of a part for the benefit of the whole, as for example a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests. Thirdly, the attempt so made to avoid the common peril to which all those interests were exposed must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case." (a)

(a) The *Star of Hope,* U. S. Sup. Ct. 9 Wallace, 203 (1869).

The Circuit Court of Appeals in the case of the *Roanoke* said:

> "The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered into the general maritime law. It appears to have been preserved in England without enforcement by statute. It applies only to shipping, and prescribes that in all cases of imminent peril to the whole adventure, where release is obtained by intentional sacrifice of any part for the benefit of the residue, contribution shall be made by the saved portions for that which was so sacrificed. The common peril takes from the master of the vessel his paramount obligation to his vessel owners, and charges him with a joint agency for the owners of cargo and vessel, to act impartially, decide when a sacrifice is necessary, and select for sacrifice that which will best serve the interest of all to avoid the peril." (a)

The right to contribution does not necessarily cease when mere *physical safety* of the imperiled property has been procured. The courts of the United States have extended the doctrine of general average beyond this and hold, contrary in many instances to those of Great Britain and other countries, that the *mutual benefit* derived by vessel and cargo in having the voyage completed warrants allowance in general average of some of the consequential losses and damages sustained after the original peril has been averted, and even after vessel and cargo are in a port or place of safety. It must not be supposed from this, however, that all extra losses and damages are to be contributed for in general average merely because the voyage cannot be continued or completed without incurring them. Those incurred for the exclusive benefit of either vessel or cargo are chargeable directly to them, as, for instance, the cost of repairing damage to vessel sustained *in*voluntarily or the cost of reconditioning cargo made necessary owing to damage

(a) The *Roanoke*, Cir. Ct. of App. 59 Fed. Rep. 163 (1893).

accidentally received. The circumstances under which the losses and damages are incurred determine their *nature,* and this in turn determines by whom they are to be borne.

The normal use of a vessel's materials and equipment is always pledged for her successful navigation and, consequently, notwithstanding that a sacrifice of some part of them may be made for the common benefit, it may yet, although voluntary, be one that is within the ordinary duty of the vessel to her cargo, and not such as to entitle the shipowner to contribution from the cargo in general average. (a)

The ordinary or intended use of all parts of the vessel must be given, free of expense to the cargo, not only while the voyage is being pursued in safety, but also in times of common peril. It is only when damage or loss occurs from an extraordinary use of the vessel or her outfit, under pressure of a common peril, by putting them to a use different in kind or extent from that for which they were intended, or when extraordinary expenses are incurred for the common benefit, that a general average arises. *A general average act is none the less voluntary though it may be the only reasonable course to pursue in the circumstances.*

The act occasioning the loss or expense must be a *voluntary* one by the master of the vessel or pursuant to his orders, or, in his absence, by the officer in command of her—*the intentional act of man* as distinguished from *accidental* loss by the immediate effect of a peril of the sea—and must be one that is not within the ordinary duty of the vessel to her cargo under the contract of affreightment. The sacrifice must be made by some one specially charged with the control and safety of the adventure and not by the compulsory

(a) Bowing v. Thebaud, Dist. Ct. N. Y. 42 Fed. Rep. 794 (1890).

act of others, whether private persons or public authorities. (a)

In the case of *Ralli v. Troop* the Supreme Court said:

> "Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the necessity of the case, or as exercising a power and duty imposed upon him by the law as incident to his office—whatever may be considered the source of his authority—the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, appertain to the master of the vessel, magister navis, as the person intrusted with the command and safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority. In case of the master's death, disability, or absence, no doubt the mate or other chief officer of the vessel may succeed to the authority of the master in this as in other respects."

The fact that a vessel undertakes for a stipulated amount of freight to carry cargo from one port to another is no answer to the shipowner's claim for contribution in general average if the peril which gave rise to the sacrifice or expenditure was not contemplated, nor brought about by her unseaworthiness or by negligence. Unseaworthiness caused by perils of the sea during the voyage does not, of course, prejudice the claim for contribution.

It will be seen in the next chapter, however, that a shipowner may, *when there is a special provision in the contract of affreightment,* be entitled to contribution from the cargo owner notwithstanding that the peril to avert which the sacrifice was made, or expenditure incurred, arose from unseaworthiness or negligence of his servants. Even then he must show that he used due

(a) Wamsutta Mills v. Old Colony Steamboat Co., Sup. Ct. Mass. 137 Mass. 471 (1884).

Ralli v. Troop, U. S. Sup. Ct. 15 Sup. Ct. Rep. 657 (1895).

diligence to make the vessel in all respects seaworthy, and properly manned, equipped and supplied. (a)

The test of seaworthiness of a vessel in respect of cargo is whether she is reasonably fit to carry it (b), and she must be so tight, staunch and strong as to be able to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo. (c) A vessel must be seaworthy at time of *sailing* and not merely when she begins to load cargo. (d) (*post*, p. 20.)

In a recent case the Court stated:

> "There can be little question that a vessel seaworthy as to navigation may be unseaworthy as to cargo. So a ship may be seaworthy as to one part of the cargo and unseaworthy as to another. The warranty of seaworthiness extends, not alone to the vessel, but also to its reasonable and suitable adaptability and fitness to carry each particular article well known to commerce. Especially would this be so where the article is one carried in the usual course upon the sea or navigable waters. The term "seaworthy" in its earlier use, it must be admitted, was not of as broad or extended significance as under the present advanced state of commerce and transportation facilities; but it now has relation to the article carried, and the different compartments of the ship and their particular use as well as to the navigability of the ship." (e)

An important ruling of the Supreme Court in the matter of seaworthiness was as follows:

> "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or

(a) The *Jason*, U. S. Sup. Ct. 32 Sup. Ct. Rep. 560 (1912).

(b) The *Silvia*, U. S. Sup. Ct. 19 Sup. Ct. Rep. 7 (1898).

(c) Dupont de Nemours & Co. v. Vance, U. S. Sup. Ct. 19 Howard 162 (1856).

(d) Bowring v. Thebaud, Cir. Ct. of App. 56 Fed. Rep. 520 (1892).

(e) The *Indrapura*, Dist. Ct. Ore. 178 Fed. Rep. 591 (1910).

shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." (a)

If *unseaworthiness* is alleged by cargo owners as a defense to the shipowner's claim for contribution, and the shipowner can present a *prima facie* case to the contrary, the burden of proof then rests upon the former to establish their contention, under the primary rule in pleading that what is averred must be proved.

Negligence has been defined to be:

"The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined, in all cases, by reference to the situation and knowledge of the parties, and all the attendant circumstances. The law does not charge culpable negligence upon any one who takes the usual precautions against accident which careful and prudent men are accustomed to take under similar circumstances." (b)

The following is a dictum of the Supreme Court:

"It is quite true that negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. This principle nowhere has been more fully recognized than by this court. (Lawrence v. Minturn, 17 How. 100, 110. The *Star of Hope*, 9 Wall. 203.) But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned." (c)

If *negligence* is alleged and interposed by cargo owners as a defense to the shipowner's claim for contribu-

(a) The *Edwin I. Morrison*, U. S. Sup. Ct. 14 Sup. Ct. Rep. 833 (1894). The *Caledonia*, U. S. Sup. Ct. 15 Sup. Ct. Rep. 537. (1895).

(b) Crandall v. Goodrich Transp. Co., Cir. Ct. Wisc. 16 Fed. Rep. 75 (1883).

(c) Oceanic Steam Nav. Co. v. Aitken, U. S. Sup. Ct. 25 Sup. Ct. Rep. 317 (1905).

The Court stated as follows:

> "In other words, a situation of imminent danger to the whole enterprise was believed to exist, and did apparently exist, such as apparently required this sacrifice to be incurred; and it was upon that judgment and belief that the sacrifice was made, and made, as supposed and understood at the time, necessarily in the interest and for the safety of all concerned. This is sufficient to support a general average charge, where the judgment of the master was in good faith, as is here evident, and was formed upon reasonable grounds. In such cases the master, as authorized agent of all interested in the adventure, acts in behalf of all, and binds all to contribute for the sacrifices made for the common benefit, even though his act may turn out to be a mistake." (a)

A crack being discovered at sea in the shaft of a steamer bound for New York, it was strengthened by bolts and she proceeded at reduced speed until 16 miles from Sandy Hook, when the shaft broke and greatly damaged the machinery. Contribution was claimed by the shipowner from the cargo on the ground that the risk to the vessel by proceeding with the temporarily strengthened shaft was foreseen by the master and deliberately undertaken by him in full contemplation of the liability to the damage to the machinery that subsequently occurred, in order to work her into port and save the vessel and cargo the great expense of outside assistance. The evidence showed, however, that while the master and officers recognized the *possibility* of a new breakdown and further damage, they confidently believed that it could be avoided. It was held, in view of such evidence, that there was no such voluntary or intentional sacrifice as to make the case one of general average. (b)

A steamer, while loading alongside a wharf, was found, when nearly loaded, with her fore peak full of water, arising from a hole in one of the plates in the

(a) The *Wordsworth,* Dist. Ct. N. Y. 88 Fed. Rep. 313 (1898).

(b) Van den Toorn v. Leeming, Cir. Ct. of App. 79 Fed. Rep. 107 (1897).

bottom, from some cause unknown. A tight bulkhead protected the cargo from injury or danger of injury, and it appeared from the evidence that the vessel and cargo could have remained at the wharf as they were, without injury and in safety, as long as the owner of either desired. The vessel was put on dry dock with her cargo on board and after repairs were made she completed her loading and proceeded on the voyage.

In suit by the shipowner to recover contribution in general average from the cargo, the District Court held that none of the extra expenses incurred were for the benefit of the cargo or to rescue it from peril, that the risk of such accidents, while loading, falls upon the shipowner, and that consequently the cost of the repair, whether temporary or permanent, and all the incidental charges connected with it, not being an extraordinary expense within the meaning of the law of general average, were such as he alone was bound to bear.

The Court stated as follows:

> "He could not undertake the voyage without making his ship seaworthy at the time she sailed; and his implied warranty of seaworthiness to the cargo owners bound him, therefore, to bear all such charges without calling on the cargo for contribution. The repair of the ship in this case was not in itself, therefore, any act of sacrifice, and there was no other such act. In the case of fire on a vessel at a dock before the commencement of the voyage, where a general average has been allowed, there was not only danger of the loss of both ship and cargo, but also some voluntary act of sacrifice or expense made or incurred to rescue from that danger, such as scuttling, jettison, salvage services, etc., which caused the charge that was distributed as general average. Here nothing of that kind existed." (a)

On trial of the case in the Circuit Court of Appeals (b) the Court did not decide the question as to whether the cargo was in any peril, but denied the shipowner's

(a) Bowring v. Thebaud, Dist. Ct. N. Y. 42 Fed. Rep. 794 (1890).
(b) Bowring v. Thebaud, Cir. Ct. of App. 56 Fed. Rep. 520 (1892).

claim to contribution on the ground that it was obligatory on him, *under his implied warranty of seaworthiness,* to have the vessel in proper condition for the voyage not only while loading but also *at time of sailing,* and that consequently, as the necessity for the extra expenses did not arise from any voluntary act of sacrifice, he had no claim against the cargo for contribution in general average.

It happens occasionally that a vessel is justifiably abandoned at sea, with no intention on the part of the master or crew to return to her. If she and her cargo are brought into port by salvors, and control of the property and of the voyage are not regained by the master before the cargo owners intervene and elect to end the contract of carriage and refuse to go on with the voyage because of the abandonment, is the shipowner entitled to contribution from the cargo in general average toward sacrifices made for the common benefit before the abandonment?

In a case of this kind, where masts, rigging, etc., were cut away prior to the abandonment, and the vessel, with her cargo (not perishable), were subsequently brought into an intermediate port by salvors, the cargo owners, because of the abandonment of the vessel and cargo at sea, and notwithstanding the desire and ability of the master to complete the voyage, elected to treat the contract of affreightment as at an end, and, by their action in obtaining possession of the cargo by Court order, prevented the resumption of the voyage. The lower Courts held that there was no actual renunciation of the contract by the shipowners and that there was not, in that respect, any actual intention one way or the other involved in the abandonment, and conceded to them the right of general average contribution against the cargo, and, on principles of equity, subjected the cargo to a payment of *pro rata* estimated *net* freight. The Supreme Court, however, held that no liability for

freight existed, and, in respect of the claim for general average contribution, its *dictum* was as follows:

> "The argument urged to the effect that the cargo's liability to general average created a right to have the voyage finished, however it might have been otherwise, does not need an extended answer. The cargo owners had the same right to treat the contract as ended as against a shipowner who had cut down a mast, that they would have had against one who had made no sacrifice for the common good. The contract is the supreme source of mutual rights, and cannot be overridden by the incidents of its performance." (a)

It appeared from the foregoing that the doctrine declared by the Supreme Court was that the right of recovery by the shipowner in general average for voluntary sacrifices made before an abandonment was lost by the renunciation of the contract of carriage (namely, by the enforced abandonment of the vessel without intention to return to her), and, as the statement of the Court that "the contract is the supreme source of mutual rights" (thus involving the doctrines of general average with those obligations of vessel and cargo that arise from contract) was quite contrary to accepted authority that the right to contribution in general average does not arise from contract, but is based upon natural equity and upon the established law of the sea, a petition was made by counsel for a re-hearing to determine the exact scope of the decision, but, unfortunately, was denied by the Court.

A further *dictum* of the Supreme Court in this case was as follows:

> "If it be true that if, on the other hand, the master had rejoined the ship before anyone else had taken possession, or had got it back from the salvors before the cargo owners had been heard from, he might have had a right to complete the voyage, the ground must be that the law would not insist on a technical breach of condition when there had been no substantial change of circumstances and no harm done."

(a) The *Eliza Lines*, U. S. Sup. Ct. 26 Sup. Ct. Rep. 8 (1905)

Counsel, in their petition for a rehearing, called the Court's attention to the doctrine of the civil and maritime law that "the salvor of a derelict vessel is the protector of the property for whomever may turn out to be the owner, and being *negotiorum gestor,* his possession is not adverse to the title of the master." They also instanced the case of a sudden outbreak of fire on board a vessel which may force the master and crew to temporarily abandon her and the cargo, and maintained that such action, compelled by an overpowering force, had never been held to amount to a renunciation of the right to exact equitable contribution for previous sacrifices.

Therefore, where a vessel and her cargo, justifiably abandoned at sea by the master and crew, are brought into port by salvors, it would seem, in view of the reasoning of the Supreme Court, that the right of the shipowner to freight and to contribution in general average from the cargo toward voluntary sacrifices made before the abandonment would depend upon whether the master promptly, and with reasonable diligence, regained possession of vessel and cargo, and in that way revived his right to complete the voyage, *before* the cargo owners stepped in and recovered their property direct from the salvors.

Demurrage and loss of interest or market are not subjects of contribution, being considered as remote and not as direct consequences of a general average act; and, similarly, deterioration of or loss on cargo by *delay* at a port of refuge or through climatic conditions because of such delay are not allowed for.

No allowance is made for loss of freight under a time charter, because such loss is the result of the contractual relation between the shipowner and the time-charterer, with which the cargo owner is not concerned.

In the case of the *Leitrim* (9 Asp. Mar. Cas. 317), decided in England in 1902, the shipowners sought to recover a contribution in general average for net loss of

time charter freight by reason of the payment of hire ceasing, in accordance with the cesser clause in the charter party, whilst the vessel was detained undergoing repairs of general average damage sustained while loading a cargo of coal at Barry for Cape Town. The Court, however, decided against the claim on the ground that the loss of the freight caused by the delay was the result of "an accidental circumstance peculiar to the shipowners and time charterers," viz., the operation of the cesser clause, and that the cargo owners were in no way parties to the time charter contract.

In regard to the question as to whether the shipowners were entitled to contribution in general average "on the basis of the ordinary consequences of the delay, as if the ship were carrying the goods simply under the contract under which they were shipped," the Court said:

> "But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed. In the first place, so far as I can ascertain, a loss of this character has never been claimed in general average. It is not introduced in the York-Antwerp Rules, nor can I find any trace of its being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in general average of the wages and maintenance of the crew. It may be said, why on principle should not the loss of time be compensated for where that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that, although possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present the loss of time is common to all the parties interested and all suffer by the delay, so that the damages by loss of time may be considered proportionate to the interests, and may be left out of consideration. Were this otherwise, great inconvenience would arise and enormous difficulty be found in attempting to ascertain what was the proper amount of loss on each of the numerous interests which go to make up a shipping adventure. An average adjuster has a heavy task now when he has to deal with actual losses and values, but if he were also to have to assess speculative and estimated loss his

task would be still heavier. Moreover, this inconvenience and difficulty is practically obviated by treating everyone's loss of time as proportionate to his interests, and not bringing it into account. This appears to work substantial justice, for, referring to what I have said about 'accidental circumstances peculiar to a party,' it seems clear that if the losses by delay—I am not dealing with expenses—were to be investigated the accidental circumstances would be excluded, with the result that all that could be considered would be the loss of the profitable employment during the delay of the capital invested in each interest concerned; and it would be unreasonable to embark upon an examination of what, upon such a basis, would be the loss on each interest; so that, for all practical purposes, the losses may be considered as proportionate to the interests, and left out of consideration altogether."

A cesser clause in a charter-party provided that all liability of charterer should cease as soon as the cargo was on board, and that "all questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose." It was held that this clause applied only to questions arising under the charter-party in respect of payment of freight, demurrage, etc., and did not free the charterer, who was also the owner of the cargo, from his obligation to contribute to general average expenses incurred during the voyage. The Court pointed out that such obligation was imposed by law and incidental, not to the charterer's position as charterer, but to his ownership of the cargo, and that the obligation to contribute springs from the law itself and not from any contract between the parties concerned. (a)

It has been held that a tug towing barges from one port to another is not bound up with them into a single maritime adventure so as to be subject to the law of general average, even though her compensation for the towage is measured by the freight earned by the barges; and that the act of the tug in cutting loose from them,

(a) Marwick v. Rogers, Sup. Ct. Mass. 163 Mass. Rep. 50 (1895).

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allowing them to go ashore in order to save herself, does not subject her to contribution.

> "It is solely for the purpose of performing the contract of towage that the vessels towed are put under the control and management of the master of the tug. In all other respects, and for all other purposes, they remain under the control of their respective masters; and, in case of unforeseen emergency, it is upon the master of each that the duty rests of determining what shall be done for the safety of his vessel and of her cargo. If the question arises whether it is safer for one of the barges to continue in tow, or to cut loose and anchor, the decision of that question ultimately belongs to her own master, and not to the master of the tug. And if the question presented is either whether the barge should be run ashore for the purpose of saving her cargo, or else whether a part or the whole of the cargo of the barge should be sacrificed in order to save the rest of her cargo, or the barge herself, the decision of the question whether such stranding or jettison should or should not be made is within the exclusive control of the master of the particular barge, and in no degree under the control of the master of the tug; and, in either case, any right of contribution in general average cannot extend beyond that barge and her cargo." (a)

(a) The *J. P. Donaldson,* U. S. Sup. Ct. 17 Sup. Ct. Rep. 951 (1897).

CHAPTER II

UNSEAWORTHINESS—NEGLIGENCE

"GENERAL AVERAGE AGREEMENT" IN CONTRACTS OF AFFREIGHTMENT

The rule of law that no demand for contribution in general average can be enforced by the shipowner against the cargo where the peril to avert which the sacrifice is made, or expenditure incurred, arose through the unseaworthiness of the vessel, or through negligence, has always been recognized in the Federal Courts of the United States, on the broad ground that a principal is chargeable with the faults or negligence of his servants or agents.

The fact, however, that the necessity for the sacrifice or expenditure for the common benefit arose through unseaworthiness or negligence makes it none the less a *general average* damage or loss, viz., one incurred for the general benefit of vessel and cargo; the existence of the unseaworthiness or negligence does not change the *nature* of such damage or loss (a), but, *in the absence of a valid contract to the contrary,* the shipowner is precluded from claiming contribution from the cargo.

> "The doctrine of general average, however, is a peculiar one, and its application does not seem to be concluded by the primary cause of the loss, but is rather dependent upon what occurred in the effort to save property." (b)

(a) Pacific Mail S. S. Co. v. New York, Honduras & Rosario Mining Co., Cir. Ct. of App. 74 Fed. Rep. 564 (1896).

(b) Norwich & N. Y. Transp. Co. v. Ins. Co. of North America, Dist. Ct. N. Y. 118 Fed. Rep. 307 (1902).

The Act of Congress, commonly known as the Harter Act (a), passed in 1893, by its third section provides as follows:

> That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel * * *

It was believed by shipowners that as, by this section of the Act, a vessel, seaworthy at the beginning of the voyage, so far as due diligence by the owner could make her, was relieved from damage or loss resulting from faults or errors in her navigation or management, they, in turn, could, because of the relief thus afforded them, rightfully demand contribution in general average from the cargo for sacrifices of their property in successful efforts to save vessel and cargo, notwithstanding that the disaster was due to the negligence of those on board.

The Supreme Court, however, in the case of the *Irrawaddy,* answered this in the negative and stated that the main purposes of the Act were to relieve the shipowner

> "from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel,"

but held that it was not the intention of the Act to allow a shipowner to claim contribution in general average toward his losses occasioned by faults in the navigation or management of the vessel, notwithstanding that such losses were incurred in saving vessel and cargo. (b)

(a) For complete text of the Act, see Appendix, p. 189.

(b) Flint, Eddy & Co. v. Geo. Christall, U. S. Sup. Ct. 18 Sup. Ct. Rep. 831 (1898). (For complete text of opinion, see Appendix, p. 207.)

In the case of the *Jason* (a) the District Court, referring to the decision of the Supreme Court in the *Irrawaddy* case, said:

> "The Court did recognize the Harter Act as relieving the shipowner (under certain circumstances) from 'liability for the negligence of his servants,' but denied that it conferred upon him any new or affirmative right of recovery in general average or otherwise against the owners of cargo lost or damaged by such negligence. The statute was declared to be a shield against one particular form of attack by shippers, i. e., a claim in tort for negligence, or in contract for breach of the agreement for safe carriage. But the Supreme Court did not hold that the fault or tort or negligence was extinguished by the statute."

If, therefore, a vessel strands, or is in collision, or meets with other disaster through *negligent navigation,* and, by reason of the common peril thus brought about, damage is done to the vessel in successful efforts to save her and the cargo, the case, *in the absence of a valid contract to the contrary,* is not one in which the shipowner can claim contribution from the cargo, notwithstanding that he can show due diligence was used to make the vessel seaworthy.

While the cargo in such a case would not be liable for contribution to the vessel's losses and sacrifices, it would be liable for salvage or other expenses incurred in saving it. The parties rendering the service could, if they chose, enforce their lien and look directly to the cargo for its proportion notwithstanding that the disaster was due to negligence, and it is the general view that if the owner of a vessel, who has used due diligence to make her seaworthy, etc., and being relieved by the Harter Act from liability for damage to or loss of the cargo resulting from negligent navigation, paid the entire salvage or expenses in the first place instead of leaving the cargo owner to pay his proportion direct to the parties rendering the service, he would be entitled to

(a) The *Jason,* Dist. Ct. N. Y. 162 Fed. Rep. 56 (1908).

reimbursement from the cargo owner, it being considered that such payment by him was merely an advance, as agent, for account of the latter; and, conversely, and always excepting unseaworthiness, that, if the cargo owner made direct payment to the salvor or other parties rendering service to the cargo, he could not recover the amount from the shipowner. The doctrine of the *Irrawaddy* was limited to the *damage to the vessel herself.*

Suppose, however, that a vessel, seaworthy at the beginning of the voyage, is negligently stranded, and floated after damage to, or jettison of, part of the cargo, but sustained little or no damage herself in the efforts made to float her. Could the shipowner in such a case properly say that, as he is relieved by the Harter Act from liability for the loss of the cargo, no contribution is due by the vessel toward the loss sustained by the cargo?

This point was decided by the District Court in the case of the *Strathdon* (a), there being no special agreement in the contract of affreightment regarding contribution in general average. The facts were as follows:

While the steamer was on a voyage from Java to the United States with a cargo of sugar, in baskets, some of them stowed on planks on the iron floor of the between decks were ignited by the heat of the flue of the donkey boiler in the stokehole bulkhead directly beneath it, and during the flooding of the hold to extinguish the fire the vessel grounded in the Suez Canal and listed, in consequence of which water found its way into the hold and damaged the cargo there.

It was found by the Court that the fire was caused by the negligence of the donkeyman in allowing the flue to become overheated and not by the design or neglect of the shipowners, and, therefore, that they were not liable for the cargo injured or destroyed by the fire, and

(a) The *Strathdon,* Dist. Ct. N. Y. 94 Fed. Rep. 206 (1899).

that, as the fire was the proximate cause of the damage by water to the cargo in the hold, they were not liable for that damage.

The cargo owners, under this decision, not being able to recover any of their damage from the shipowners directly, sought to recover from them a contribution in general average, at the same time contending that the shipowners could recover no contribution for their sacrifices and expenses under the decision in the case of the *Irrawaddy* (*ante,* p. 27). The shipowners, on the other hand, contended that because the fire was caused by the negligence of one of their servants there could be no adjustment in general average at all between them and the cargo, and that, if there could be one, it must be stated upon the usual equitable principle that all the parties to it contribute to each other's sacrifices and expenses.

The decision of the District Court was as follows:

1. The Fire and Harter Statutes intend to relieve shipowners, in case of compliance therewith, from any liability to cargo owners for injury to cargo.

2. Such statutes do not give the shipowners any new right to sue the cargo owner for injury to the ship caused by the peril.

3. The cargo owner cannot, under the guise of an action for contribution in general average, recover upon the basis of the shipowner's alleged constructive negligence a portion of the damage, which, upon the same alleged grounds, he could not recover in a direct action.

4. While the shipowner, freed from liability by the Statutes, may not invoke an action for general average adjustment to obtain payment of his own losses, the cargo owner may do so, but, as the Statutes prevent the latter from recovering any damages based upon the shipowner's alleged negligence, the cargo owner may not, in the adjustment invoked by him, derive any benefit from such alleged negligence.

5. In such cases the usual rule of reciprocity of right and obligation exists, and the adjustment should be made as if there was no negligence in the case, there being none, in fact, on the part of the shipowners.

In the Circuit Court of Appeals the conclusion was reached that the fire occurred without negligence either on the part of the donkeyman or of the shipowners, but, although the Court expressed approval of the reasoning of the District Court, so far as the general average feature of the case was concerned, its dictum was not necessary to the judgment in favor of the shipowners. (a)

Notwithstanding that the disaster resulted, in the opinion of the District Court, from negligence of those on board, the shipowner, because of the demand of the cargo owner for an adjustment in general average, was enabled, in effect, under its decision to recover a contribution from the cargo toward the sacrifices of the vessel. It was thought by some, however, that the shipowner in such an adjustment invoked by the cargo could not bring the cargo in debt to him; in other words, that if the adjustment showed a balance in his favor he could not collect it, whereas he would be obliged to pay any balance shown to be due to the cargo.

It was so decided by the District Court in the case of the *Jason,* the Court saying:

> "While believing that under the decision in the *Strathdon* there can be no adjustment in general average without taking into consideration the sacrifices of these negligent shipowners, it is impossible that such advances can be used further than to defeat the otherwise valid claims of the shippers. The hull owners can have no affirmative recovery in any form of action * * * The effect of the decision in the *Strathdon* is to blot out the fact of negligence when the action is promoted by an innocent libelant and leave it as a bar to any suit begun by the tort feasor." (b)

On appeal of the *Jason* case to the Circuit Court of Appeals the Court, dealing with the question of recovery in general average in cases involving negligent naviga-

(a) The *Strathdon,* Cir. Ct. of App. 101 Fed. Rep. 600 (1900).
(b) The *Jason,* Dist. Ct. N. Y. 162 Fed. Rep. 56 (1908).

tion, and referring to the decision of the District Court in the case of the *Strathdon,* stated:

> "That to allow the cargo owner in such cases to obtain by indirection what the statute expressly says he should not obtain would be as much 'in the nature of a legislative act' as was the construction contended for and disallowed by the majority of the Supreme Court in the *Irrawaddy.*"

The Circuit Court of Appeals went further than this, however, and stated as follows:

> "But, on more mature consideration, we are further satisfied that the more logical way to accomplish a result conformable to the Statute is to hold that the cargo owner may not bring the shipowner, as a contributing interest, into a general average adjustment which may result in a claim which the Harter Act disallows." (a)

This statement was a very startling one, especially to cargo owners and their underwriters, the principle having always been recognized that the law of general average is independent of and unaffected by statute (The *Roanoke, post,* pp. 89-90). Under the above ruling a cargo owner could not recover from the shipowner any contribution toward sacrifice of cargo for the common benefit of vessel and cargo if the necessity for the sacrifice arose from "faults or errors in navigation or in the management" of the vessel.

The contention of cargo owners was that, although the provisions of the Harter Act relieve a vessel and her owners, under certain conditions, from responsibility for damage or loss to cargo resulting from "faults or errors in navigation or in the management of the vessel," the Act goes no further than this, that it was not intended by Congress that it should, and that it does not, if interpreted strictly (as was done by the Supreme Court in the case of the *Irrawaddy*), blot out such faults or errors so as to place the shipowner in the eyes of the law in the position of an innocent party.

(a) The *Jason,* Cir. Ct. of App. 178 Fed. Rep. 414 (1910).

They maintained, notwithstanding the rulings of the Courts in the *Strathdon* and *Jason* cases, *that the vessel remains in the position of a wrong-doer* and that although the Harter Act protects her and her owner, under certain conditions, against direct claim for damage or loss to cargo, it does not change or affect the law of general average so as to enable the shipowner to escape responsibility for contribution toward voluntary damages or losses suffered by innocent cargo owners, as much for the benefit of vessel as of cargo. They contended further that such contribution should be enforceable without right to the shipowner to have included in the general average any losses and damages sustained by the vessel, as a partial or complete offset to the cargo owners' claim, on the ground that the negligence of his servants precludes him from asserting any claim for contribution.

Subsequent to the decision in the case of the *Irrawaddy* the following "General Average Agreement," or one of similar import, was prepared and inserted by shipowners in bills of lading:

> If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at the time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred, but, with the shipowner shall contribute in general average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent, or other defects or unseaworthiness.

This clause was designed to overcome, *by contract,* the effect of the decision in the case of the *Irrawaddy,* but in the case of the *Yucatan,* where it was contained in

the bill of lading, it was held that in the absence of explicit authority in the Harter Act for such contract provision, the old law, forbidding, as a matter of public policy, contracts tending to overcome the effect of negligence, still remains in force. (a)

In the case of the *Jason,* on appeal, a ruling of the Court on the question of the validity of this clause was sought, but the Court stated as follows:

> "But the majority decision in the *Irrawaddy* indicates quite clearly a construction of the Harter Act by the Supreme Court which will confine the provisions of the third section narrowly to the relief of a shipowner from claims made against him, and will not allow him to become himself the claimant when faulty navigation has caused the mishap." (b)

The Circuit Court of Appeals did not state that the clause is unreasonable or invalid as opposed to public policy. It seems to have based its decision solely on the general language used by the Supreme Court in the case of the *Irrawaddy,* and not to have considered the question of the validity or not of an *express contract* in the bill of lading, and by which the shipowner in no way seeks to exempt himself from the obligation resting upon him to use due diligence to make his vessel in all respects seaworthy or from the performance of any duty toward the cargo.

The decision of the Supreme Court therefore in the case of the *Irrawaddy,* and those of the lower courts in the cases of the *Strathdon, Yucatan,* and *Jason,* placed the shipowner, in the matter of general average, practically in the same position as before the enactment of the Harter Act in 1893, the interest of cargo owners being adversely affected by the *Strathdon* decision, and more seriously so in the case of the *Jason* in the Circuit Court of Appeals.

(a) New York & Cuba Mail S. S. Co. v. Ansonia Clock Co., Dist. Ct. N. Y. 139 Fed. Rep. 894 (1905).

(b) The *Jason,* Cir. Ct. of App. 178 Fed. Rep. 414 (1910).

The following is a brief summary of the facts in the case last mentioned:

The Norwegian steamer *Jason,* while on a voyage in July, 1904, from Cienfuegos, Cuba, to New York with general cargo, consisting principally of bags of sugar, stranded off the south coast of Cuba and was floated by salvors after some of the cargo had been jettisoned and after sacrifices on the part of the vessel. The voyage was then resumed and the remainder of the cargo was delivered to the several consignees at New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them. The bills of lading contained the following provision:

> "General average payable according to York-Antwerp Rules, and as to matters not therein provided for according to usages of port of New York."

and also contained the "General Average Agreement" (*ante,* p. 33).

The shipowner and cargo owners presented their claims to the adjusters for sacrifices made by them respectively for the common benefit of vessel and cargo, and the adjusters allowed in the general average the compensation of the salvors, the sacrifices of the cargo, and the sacrifices and extraordinary expenditures of the shipowner. The adjustment showed a balance due from one of the cargo owners, which the latter refused to pay on the ground that the stranding resulted from the vessel's negligence and that the general average agreement contained in the bills of lading was invalid.

Suit was brought by the owners of the vessel against the cargo owner and his guarantor to recover the balance above referred to, and the latter filed a cross libel to recover from the shipowners a sum which they alleged would be due them on an adjustment of the general average losses, if the shipowner's losses and sacrifices, although incurred for the common benefit of vessel and

cargo, were excluded from the general average account by reason of the fact that the stranding was caused by negligent navigation. If the shipowner's losses and sacrifices had been excluded the adjustment would have shown a balance in favor of the cargo owner, part of whose cargo was jettisoned.

The District Court found that the stranding was caused by negligent navigation and, on this finding of fact and relying on the judgment in the case of the *Irrawaddy,* dismissed the libel of the shipowners, and, following the judgment in the case of the *Strathdon,* decided against the contention of the cargo owners, and held that "the principle of adjustment must be the same as if the *Jason's* stranding had been due solely to *vis major* and the ship free from any fault at all." The Court, however, refused, even on this principle, to allow a recovery to the shipowners of the balance claimed for, on the ground that, while the fact of negligence is blotted out when the action is promoted by an innocent libelant, it remains as a bar to any suit begun by the party at fault, and, consequently, that the shipowners could have "no affirmative recovery in any form of action," (*ante,* p. 31).

Upon appeal the Circuit Court of Appeals at first filed an opinion for affirmance but, as will be noted below, afterward granted a rehearing, and the case was taken to the Supreme Court.

The shipowner, being unwilling to rest content with the decision of the lower Courts, which considered the "General Average Agreement" solely in connection with the provisions of a *statute* and apparently did not view it from the standpoint of a *contract* not repugnant to the statute, and the cargo underwriters seeking to have the ruling of the Circuit Court of Appeals reversed so far as their rights to recover contribution from the shipowner were concerned, applied jointly to that Court for a rehearing of the case, which was granted, as a

result of which the following questions of law were certified to the Supreme Court for decision:

1. Whether the general average agreement above quoted from the bills of lading is valid and entitles the shipowner to collect a general average contribution from the cargo owners, under the circumstances above stated, in respect of sacrifices made and extraordinary expenditures incurred by it subsequent to the stranding for the common benefit and safety of ship, cargo, and freight.

2. Whether, in view of the provisions of the third section of the Harter Act the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding for the common benefit and safety of ship, cargo, and freight.

3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

The petition of the shipowner and cargo underwriters to the Circuit Court of Appeals for a rehearing and certificate was accompanied by the following supporting petition signed by prominent shipowners, underwriters, and average adjusters:

The undersigned steamship companies, insurance companies, underwriters and average adjusters whose interests will be affected by the decision of this Court heretofore filed herein, ask to be permitted to join in the petition for rehearing and a certificate.

1. The steamship companies join in the application on the following grounds:

The general average clause involved in the case of the *Jason* has been in general use by steamship lines trading to and from New York for the last eight or ten years. Before it was introduced in bills of lading the opinions of counsel for the respective lines and of eminent independent counsel were taken as to its validity, and the lines were advised that the clause was not opposed to public policy, but was valid. It has been retained and put into common use in reliance upon such advice. A final ruling that this clause is invalid will work the greatest inconvenience and injury to the interest of all steamship lines and owners, and in

so far as it may be proper to do so, the undersigned respectfully join in the petition of the owner of the *Jason* for a reconsideration of that question, and request, if such course can be followed, that the question of the validity of the clause may be certified to the Supreme Court for its decision.

The case of the *Irrawaddy,* 171 U. S., 187, has been found inconvenient, and in many cases unworkable in practice, and has resulted in the imposition upon shipowners of heavy burdens, which, if the parties to the contract of carriage are free to deal with by contract, they would be perfectly willing to have dealt with on the equitable basis of general average.

2. The underwriters join in this petition upon the following grounds:

Marine underwriters, as insurers of both ships and their cargoes and liable in the first instance for all sacrifices and losses of a general average nature, found in the *Irrawaddy* decision a clear and explicit determination of the effect of negligence upon the right to general average contribution. They understood that, under that decision, the adjustment of general average losses and sacrifices were to be made as theretofore had been the practice, and that the sacrifices and losses of an interest at fault were excluded from the general average, while the liability of such interest at fault, as a contributor, was not affected.

The attempt by shipowners to avoid the effect of such decision by the insertion of clauses in contracts of carriage has not been countenanced by underwriters, nor have they recognized the validity of any provisions of this kind.

The decision in the *Strathdon* case greatly disturbed the practice which had theretofore prevailed, in that it interfered with the principle of equalization of losses, and to this extent departed from a fundamental rule of the law of general average. Under that decision underwriters on cargo sacrificed were placed upon a different footing from the underwriters on other cargo, and the equality between innocent interests, which is the aim of the law of general average, was impaired. Nevertheless, this discrimination against the insurers of cargo actually sacrificed was to some extent off-set by their diminished liability as insurers of cargo not sacrificed.

The decision of this Court in the present case not only reaffirms the departure in the *Strathdon* decision from an established principle of the law of general average, but, in determining that negligence on the part of one party precludes an innocent party from recovering contribution to his sacrifices from the

party in fault, not only puts a premium upon negligence and applies the customary rule of reciprocity so as to benefit the guilty and impair the rights of the innocent, but in practice will probably have an injurious effect upon the rights of underwriters and upon maritime interests in general.

Maritime interests in general have a vital interest in seeing that the master of a vessel in a situation of peril, in determining upon the measures to be adopted to avert loss, shall act in an impartial manner as the agent, by necessity, of the owners of all property entrusted to his care. The rule of contribution has this effect, and any change in the law, which will tend to destroy this impartial attitude of the master, is greatly to be deplored. The law of contribution necessarily affects and influences a master in a situation of peril for which he is not responsible, and should be even more strictly enforced in the case of an impending peril occasioned by the master's own fault. The decision in the *Jason* case tends not only to relax, but to destroy this restraining force upon the action of the master in those cases where it is most needed, and in practice will naturally lead to unjustifiable sacrifices of cargo by negligent masters, under such circumstances as will render difficult proof of their dereliction in this respect.

3. The average adjusters join in this application on these grounds:

In the experience of average adjusters, the rule announced in the *Irrawaddy,* as modified by the *Strathdon* decision, has been found in a large number of instances to be practically unworkable and has gravely complicated the already much complicated adjustment of general average.

The contribution of cargo owners to the ship's losses having been made dependent upon whether a particular cargo owner had suffered a loss giving him a right to contribution, the collection of such a contribution depended upon whether the amount of the particular owner's allowance equalled or exceeded his contribution. Average adjusters have welcomed any provision in the bill of lading which would avoid these difficulties.

The practical application of the doctrine announced in the decision of this Court in the *Jason* will be one of extreme difficulty, and, indeed, will be unworkable, without imposing upon the owners of cargo sacrificed an undue proportion of the burden of the loss arising from such a sacrifice, or the complete elimination of the salved value of the ship as a contributing factor, or require the apportionment of the ship's proportion

of general average on innocent cargo not claiming contribution, and thus increase its burden. In fact, adjusters do not see how they can make such apportionment, under the doctrine stated, in accordance with recognized principles of general average.

In May, 1912, the vexed questions were disposed of by the Supreme Court (a), the final arbiter of all disputes arising under the laws of the Federal Government. The Court commenced by stating that "the principal controversy is upon the question of the validity of the agreement that, if the shipowner 'shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped, and supplied,' then, in case of danger, damage, or disaster resulting from (*inter alia*) negligent navigation, the cargo owners shall not be exempted from liability for contribution in general average, but with the shipowner shall contribute as if such danger, damage, or disaster had not resulted from negligent navigation." The statement of facts showed that the shipowner had fulfilled the condition as to seaworthiness imposed upon him by this clause, and the Court stated that the question presented for solution turned upon the effect of the third section of the Harter Act and of its decision in the case of the *Irrawaddy*

Referring to the decisions of the lower Courts in the cases of the *Yucatan* and *Jason* the Supreme Court pointed out that those Courts adopted the view that its construction of the Harter Act in the case of the *Irrawaddy* prevented a shipowner from making an agreement with cargo owners for a participation with them in general average contributions resulting from negligent navigation or management of the vessel. The Court stated that in reaching this conclusion the lower courts misconceived the effect of the language used, and that they gave to that decision "an import quite beyond its legitimate scope," and that in the *Irrawaddy* case there was no

(a) The *Jason*, U. S. Sup. Ct. 32 Sup. Ct. Rep. 560 (1912). (For complete text of opinion, see Appendix, p. 213.)

agreement between the shipowner and cargo owner respecting general average, nor respecting the consequences of a stranding or other peril that might result from negligence. In answering the first question submitted the Supreme Court, in upholding the validity of the general average clause, stated as follows:

> "In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated."

In regard to the second question the Supreme Court said:

> "Having already held that the general average clause contained in the bill of lading is valid as against the cargo owner, it follows *ex necessitate* that it is valid in his favor; indeed, no ground is suggested for disabling the shipowner from voluntarily subjecting himself or his ship to liability to respond to the cargo in an action or in a general average adjustment, for the consequences of the negligence of his master or crew, even though by the Harter Act he is relieved from responsibility for such negligence. Therefore we have only to determine whether by the language of the general average clause the cargo owners are entitled to contribution from the ship for sacrifices of cargo made subsequent to the stranding for the common benefit and safety. The language is that in the circumstances presented the consignee or owners of the cargo shall not be exempted from liability for contributions in general average, or for any special charges incurred, but with the shipowner shall contribute in general average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such default, negligence, etc. This language clearly imports an agreement that the shipowner shall contribute in general average. The opposite view would render the clause inconsistent with the principles of equity and reciprocity upon which the entire law of general average is founded."

The Supreme Court disposed of the third question as follows:

> "The foregoing considerations compel a negative answer to the third question. In view of the valid stipulations contained in the bill of lading, it would be a contradiction of terms to permit the cargo owners to recover contribution from the ship in respect of general average sacrifices of cargo, without on their part contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose. This would not be general average contribution, the essence of which is that extraordinary sacrifices made and expenses incurred for the common benefit and safety are to be borne proportionately by all who are interested."

As the result of the litigation in the case of the *Irrawaddy* in the Supreme Court, followed by those of the *Strathdon, Yucatan,* and *Jason* in the lower Courts, and the *Jason* in the Supreme Court, the rights of shipowner and cargo owner under the Federal law in cases where the disaster is due to *negligence of the shipowner or of his servants* may be stated generally as follows:

When sacrifices are made or extraordinary expenditures are incurred for the common benefit of vessel and cargo, and the contract of affreightment does *not* contain a valid general average agreement:

(1) If they are made and incurred by the shipowner he cannot recover contribution in respect of his own losses. If, however, he settles claims for salvage and other charges for which third parties had a lien on the cargo, it is the general view that if he has used due diligence to make the vessel seaworthy, etc., he is entitled to recover the amounts from the cargo owner, by reason of the protection afforded him by the Harter Act (Sec. 3). (a)

(a) The above is a statement of the present practice. The finding of the Circuit Court of Appeals in the *Jason* case that the shipowner, because of the provisions of the Harter Act, is not liable to contribute to sacrifices of cargo made for the common benefit of vessel and cargo resulting from negligent navigation is not, in practice, followed. The

(2) If they are made and incurred only by the cargo, the cargo owner recovers contribution from the shipowner. (a)

(3) If they are made by both vessel and cargo the shipowner cannot invoke a general average adjustment, but the cargo owner may do so. In the latter case the shipowner is entitled to have the vessel's sacrifices and extraordinary expenditures included in the adjustment and the cargo owner can only recover the balance, if any, which the adjustment may show in his favor. If the adjustment should show a balance in favor of the shipowner, the latter cannot collect it from the cargo owner, as his own sacrifices and losses cannot be used further than to offset the cargo owner's claim. (a)

When sacrifices are made or extraordinary expenditures are incurred for the common benefit of vessel and cargo and the contract of affreightment contains a valid general average agreement:

(1) If they are made and incurred by the shipowner he can recover contribution from the cargo owner if he can show that due diligence was used to make the vessel in all respects seaworthy, and properly manned, equipped and supplied.

(2) If they are made and incurred only by the cargo, the cargo owner can recover contribution from the shipowner.

(3) If they are made by both vessel and cargo, either party may invoke a general average adjustment, in which all the sacrifices and extraordinary expenditures are to be dealt with. If the adjustment should show a balance in favor of the cargo owner he can collect it, and if the balance is in favor of the shipowner the latter can col-

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Supreme Court did not find it necessary to deal with this point, but it is hoped that in the near future it will come before that Court for decision.

lect it if he can show that due diligence was used to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied.

The form of General Average Agreement in use at the present time, and which is considered as more comprehensive than the one involved in the *Jason* case, reads:

> If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by, faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness.

When a charter party gives to the charterer the full capacity of the vessel, and the cargo is shipped by him, it has been held by the Courts that the shipowner is not a *common* carrier, but becomes a *private* carrier (a), and apparently he and the charterer may make such contracts as they think reasonable regarding the carriage of the cargo. This was the intimation of the Circuit Court of Appeals in the case of the steamer *Fri* (b), the Court, referring to the explicit condition in the con-

(a) Sumner v. Caswell, Dist. Ct. N. Y. 20 Fed. Rep. 251 (1884).
The *Dan*, Dist. Ct. N. Y. 40 Fed. Rep. 692 (1889).
The *Royal Sceptre*, Dist. Ct. N. Y. 187 Fed. Rep. 224 (1911).

(b) The *Fri*, Cir. Ct. of App. 154 Fed. Rep. 333 (1907).

tract of affreightment exempting the vessel from liability for loss of or damage to cargo "occasioned by negligence, default, or error of judgment of the pilot, master, or mariners," stating that it has not yet been decided by any court that such a condition in a contract *where the vessel is not a common carrier* is contrary to public policy. The Court stated further as follows:

> "The decisions which deny the validity of such stipulations proceed upon the ground that the carrier is exercising a public employment and cannot by such stipulations relax his obligations to the public. Private carriers are not subject to the exceptional or extraordinary duties and liabilities of common carriers, and they may carry for whom they choose, and for such compensation and upon such conditions of liability as may be agreed upon. The contracting parties stand upon equal terms, and can make such a contract as they think reasonable. Angell, Law of Carriers, 59."

Whether a clause in a charter party, by which the shipowner becomes a private carrier, providing for contribution by the cargo toward sacrifices, losses, or expenses incurred by the vessel in averting a common peril brought about through her negligence or unseaworthiness, would be upheld by the Courts has not yet been determined. In view, however, of the decision of the Supreme Court in the case of the *Jason,* a common carrier, the clause would undoubtedly be declared a valid one.

A difficulty might arise if the charterer, as is frequently the case, had transferred the bill of lading to a third party, as it would then constitute an undertaking on the part of the vessel with the holder of it independent of and probably on conditions other than those contained in the charter party. In such case, if the clause in the charter party providing for contribution by the cargo irrespective of negligence and unseaworthiness, as above referred to, was not expressly incorporated in the bill of lading, it is difficult to see how the holder of it, a stranger to the charter party, could be held liable for contribution,

and the shipowner's remedy would apparently lie against the charterer.

A lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation was held not to be a common carrier with respect to such goods, but a private carrier and liable only as a bailee for hire. (a)

In the case of the *Cape Charles* (b) the Court stated that the distinction which marks a common from a private carrier is clearly defined, a common carrier being "one who openly professes to carry for hire the goods of all such persons as may choose to employ him." The Court quoted the following:

> "The true test of the character of the party, as to the fact whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry for all? If it is his legal duty to carry for all alike who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and in all the States, upon common carriers." Piedmont Mfg. Co. v. Columbia, etc., R. R. Co., 19 S. C. 353; 16 Am. & Eng. R. R. Cas. 194.
>
> "A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward." Pennewill v. Cullen, 5 Har. (Del.) 238.

The State Courts must enforce all the statutes of the United States, and it is held by these Courts in the State of New York and in some other States, in administering common or general commercial law, that specific and clear exemptions from negligence in a contract of affreightment must be enforced and sustained like any other clause in the contract.

The Federal Courts, however, until the recent decision of the Supreme Court in the case of the *Jason,*

(a) The *Rover,* Cir. Ct. of App. 161 Fed. Rep. 864 (1908).

(b) The *Cape Charles,* Dist. Ct. N. C. 198 Fed. Rep. 346 (1912).

refused to enforce such clauses on the ground that they are opposed to public policy, except in so far as modified by the third section of the Harter Act, but their decisions on matters of common law unaffected by statute are not binding on the State Courts, nor are those of the State Courts binding on the Federal Courts, whether the latter are sitting within or without the State.

Note.—On July 1, 1912, there was introduced in the Senate of the United States by Senator Nelson of Minnesota a bill (Senate Bill 7,208), generally known as the Nelson bill, the object of which is to amend the Harter Act in Sections 1, 3, and 4. The portion of the bill which, if passed, will seriously affect shipowners in the matter of general average lies in the proposed amendment to Section 3 of the Act.

This section, at present, provides that if the owner of any vessel transporting cargo *to or from* any port in the United States of America shall exercise due diligence to make the vessel in all respects seaworthy, etc., neither he nor the vessel shall become or be held responsible for damage or loss resulting from *faults or errors in navigation or in the management of the vessel.*

Because of this provision in the Harter Act, and on no other ground, the Supreme Court held in the *Jason* case that it is not against the policy of the law for a shipowner to contract with a cargo owner for "a participation in general average contribution growing out of such negligence," provided that the conditions in the Act as to due diligence in the matter of seaworthiness etc., have been complied with.

The proposed amendment to Section 3 of the Act confines its protection in respect of faults or errors in navigation or in the management of the vessel to those shipowners whose vessels are engaged in transporting cargo *between* ports in the United States of America, and excludes from such protection vessels, both American and foreign, trading between United States ports and foreign ports. Therefore, if the bill is passed, all shipowners *whose vessels do not trade solely between ports in the United States* would become responsible for damage or loss resulting from faults or errors in navigation or in their management—the general rule of law prior to the passage of the Harter Act in 1893.

The Nelson bill does not directly affect the law of general aver-

age, but, if placed on the statute books, would have the effect of nullifying any provision in contracts of affreightment—except in the coastwise trade—for participation by cargo owners in a general average resulting from faults or errors in navigation or in the management of vessels, as the ground upon which the Supreme Court based its decision in the *Jason* case as to the validity of the General Average Agreement would no longer exist.

The bill, however, expressly exempts shipowners, whether domestic or foreign, from liability for damage or loss resulting from "latent defects in said vessel," and, therefore, an agreement for participation by cargo owners in a general average resulting from a *latent defect* in the vessel would undoubtedly be considered valid, provided, of course, that the conditions as to due diligence in the matter of seaworthiness had been complied with.

The bill may be debated at the present session of Congress.

CHAPTER III

YORK-ANTWERP RULES

The maritime commerce of the United States, dating from the time of separation of the Colonies from the mother country, has developed in little more than a century's growth, and the early traders, not fettered by code or laws at the outset, were free to cull from and adopt what was considered best and most serviceable in the laws, usages, or codes of the older nations to guide them in maritime matters, and the law as it exists to-day is largely founded on the experience of the older countries, fitted and adapted to the needs of this country as experience has shown to be requisite. And so it is with no little satisfaction that those engaged in or concerned with maritime affairs in the United States may look upon the work and efforts of the learned representatives of the principal maritime countries in recommending for universal adoption, in their conferences at York, Antwerp, and Liverpool, a code of rules which more nearly conforms to the customs and usages of the United States than to those of any of the older nations.

This code of rules does not deal with the whole question of general average nor change its fundamental principles, but was adapted to secure uniformity of practice and to meet some of the necessities due to modern conditions, and in order that some uncertain and disputed points might be dealt with in a particular way.

A conference of "The Association for the Reform and Codification of the Law of Nations" was held at York in 1864 and again at Antwerp in 1877 and on this

latter date a code of Rules was adopted, known as "York and Antwerp Rules." At a conference of this Association held at Liverpool in 1890, and attended by representatives from the United States, Great Britain, and other nations on the continent of Europe, a revised code of York-Antwerp Rules was adopted, known as "York-Antwerp Rules, 1890" (a), closely approaching the laws and usages of the United States, and it will be found that a large proportion of the charter parties and bills of lading as now drawn up contain clauses which provide that general average shall be adjusted according to these Rules.

While these Rules are not binding in themselves, their incorporation in contracts of affreightment makes them a part of such contracts, but it is to be remembered that they affect only the individual parties to the contracts.

The Rules, so far as the *principles* of general average are concerned, do not place the shipowner in a more advantageous position for claiming contribution than before they were formulated. Take, for instance, Rule 7, which reads:

> Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

The first impression on reading this Rule would lead one to infer that if a vessel gets ashore and with her cargo is in a position of peril, and it is shown that she was floated at the risk of damage to machinery or boilers, such damage is to be allowed for in general average, irrespective of the *cause* of the stranding. Such is not the case, however, as there must be an absence of unseaworthiness and of negligence (unless excused by valid

(a) For complete text of the Rules, see Appendix, pp. 169-174.

contract) before any of these Rules can be given effect in the United States. They specify the nature of the losses and damages to be allowed for, but were not intended to supersede the principle that the party claiming contribution must be without contributory fault.

A reference to the Rules will show that, while they cover a variety of cases, they do not, nor were they intended to, include all that arise in connection with general average, and where they are silent the cases are to be dealt with according to the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these Rules.

On account of the general adoption of the Rules in contracts of affreightment they are referred to later under their different headings to enable the reader to compare them with our laws and practices. (a)

A conference of The International Law Association was held at Antwerp in 1903 and the following clause, known as "Antwerp Rule, 1903," was framed and recommended for adoption in contracts of affreightment:

> Rights to contribution in general average shall not be affected though the danger which gave rise to the sacrifice, or expenditure, may have been due to default of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such default.

This Rule is intended to accomplish the same result as the "General Average Agreement" which is usually incorporated in contracts of affreightment, and, as that agreement has been held by the Supreme Court to be a valid one (*ante,* p. 41), it may be assumed that the validity of this Rule will be upheld when it forms part of such contracts. It will be noted that it is *reciprocal* and is intended to inure to the benefit of both cargo owner and shipowner. In the vast majority of cases,

(a) Wherever the term "York-Antwerp Rules" is used hereafter it is to be understood as referring to the York-Antwerp Rules of 1890.

however, where its protection might be sought, the "default" would undoubtedly lie with the vessel rather than with the cargo, and the necessity for invoking the Rule in aid of the latter would but seldom occur. If the Courts hold the contract to be a valid one, the shipowner, when the Rule is found in the bill of lading, will be able to recover a contribution in general average from cargo toward sacrifices suffered by him in successful efforts to save vessel and cargo, notwithstanding that the disaster was due to negligence of those on board, and, by reason of the protection afforded him by the third section of the Harter Act against claims for damage or loss to cargo, there would not, it would seem, be any "remedies" open against him for such default, provided due diligence had been used to make the vessel seaworthy.

CHAPTER IV

JETTISON AND OTHER SACRIFICES OF CARGO

It is well established that loss or damage sustained by the jettison, or throwing overboard from *under* deck, of cargo, or of anything belonging to the vessel, for the purpose of lightening her when vessel and cargo are in peril, is to be contributed for in general average. This is also the case when the York-Antwerp Rules are provided for in the contract of affreightment, Rule No. 2 being as follows:

> Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

The master is the sole judge as to whether a jettison of cargo is necessary for the common safety, and, in regard to his judgment and authority to act, the Supreme Court has stated as follows:

> "If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person, to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority." (a)

(a) Lawrence v. Minturn, U. S. Sup. Ct. 17 Howard 109 (1854).
Dupont de Nemours & Co. v. Vance, U. S. Sup. Ct. 19 Howard 174 (1856).

lect it if he can show that due diligence was used to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied.

The form of General Average Agreement in use at the present time, and which is considered as more comprehensive than the one involved in the *Jason* case, reads:

> If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by, faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness.

When a charter party gives to the charterer the full capacity of the vessel, and the cargo is shipped by him, it has been held by the Courts that the shipowner is not a *common* carrier, but becomes a *private* carrier (a), and apparently he and the charterer may make such contracts as they think reasonable regarding the carriage of the cargo. This was the intimation of the Circuit Court of Appeals in the case of the steamer *Fri* (b), the Court, referring to the explicit condition in the con-

(a) Sumner v. Caswell, Dist. Ct. N. Y. 20 Fed. Rep. 251 (1884).
The *Dan*, Dist. Ct. N. Y. 40 Fed. Rep. 692 (1889).
The *Royal Sceptre*, Dist. Ct. N. Y. 187 Fed. Rep. 224 (1911).

(b) The *Fri*, Cir. Ct. of App. 154 Fed. Rep. 333 (1907).

tract of affreightment exempting the vessel from liability for loss of or damage to cargo "occasioned by negligence, default, or error of judgment of the pilot, master, or mariners," stating that it has not yet been decided by any court that such a condition in a contract *where the vessel is not a common carrier* is contrary to public policy. The Court stated further as follows:

> "The decisions which deny the validity of such stipulations proceed upon the ground that the carrier is exercising a public employment and cannot by such stipulations relax his obligations to the public. Private carriers are not subject to the exceptional or extraordinary duties and liabilities of common carriers, and they may carry for whom they choose, and for such compensation and upon such conditions of liability as may be agreed upon. The contracting parties stand upon equal terms, and can make such a contract as they think reasonable. Angell, Law of Carriers, 59."

Whether a clause in a charter party, by which the shipowner becomes a private carrier, providing for contribution by the cargo toward sacrifices, losses, or expenses incurred by the vessel in averting a common peril brought about through her negligence or unseaworthiness, would be upheld by the Courts has not yet been determined. In view, however, of the decision of the Supreme Court in the case of the *Jason,* a common carrier, the clause would undoubtedly be declared a valid one.

A difficulty might arise if the charterer, as is frequently the case, had transferred the bill of lading to a third party, as it would then constitute an undertaking on the part of the vessel with the holder of it independent of and probably on conditions other than those contained in the charter party. In such case, if the clause in the charter party providing for contribution by the cargo irrespective of negligence and unseaworthiness, as above referred to, was not expressly incorporated in the bill of lading, it is difficult to see how the holder of it, a stranger to the charter party, could be held liable for contribution,

mur to contributing to the sound value, and they must show that such deterioration in value was inevitable.

Cargo may have already suffered damage before it is jettisoned, and if it can be shown that it would have sustained further damage if, instead of being jettisoned, it had remained on board, deduction must be made accordingly, the actual loss to its owner being the amount which it would have produced if it had been left on board and arrived in the vessel.

With a cargo of fruit, fish, or other perishable goods the allowance for jettison is usually based on the average value of such portion of the cargo as arrives at destination, part of which may be sound and part damaged, either from delay or because of its own perishable nature. Should an entire cargo be jettisoned the value to be allowed is that which could have been obtained for it at time of the arrival of the vessel at destination, taking into consideration the nature of the cargo, the length of time of the voyage, and the expected out-turn if no disaster had occurred.

Goods of a highly inflammable or dangerous nature, such as oils, chemicals, etc., are generally stowed on deck, and are often jettisoned because the packages have become damaged or are adrift and a menace to the lives or health of those on board; under such circumstances no allowance is made, the real cause for the jettison being the *vice propre* of the goods themselves. And, similarly, goods which are on fire (a) or become dangerously heated or worthless during the voyage, whether stowed on or under deck, are not allowed for if jettisoned, there being, in fact, no sacrifice of anything of value.

If, by opening hatches for the purpose of jettisoning cargo, other cargo is damaged by the sea breaking on board, or in consequence of disturbance of the stowage, this damage, being a direct result of the original act

(a) Slater v. Hayward Rubber Co., Conn. State Ct. 26 Conn. 128 (1857).

of opening the hatches, is just as much a voluntary sacrifice as the jettison itself, and is contributed for. Such, also, would be the case if, in order to jettison less valuable or heavier cargo, other cargo is taken out of the hold and temporarily placed on the deck and is either damaged or washed overboard.

Cargoes of lumber, lath, logs, etc., stowed on deck, are frequently washed adrift owing to the breaking of their lashings by the sea or by the pitching and laboring of the vessel, and while in this condition are jettisoned because of the danger to the vessel and the remainder of the cargo with the deck cargo in that condition. Such cargo, however, is not contributed for, if it was impossible to secure and save it owing to weather and other conditions, as the jettison merely hastened its inevitable loss. While a menace to the vessel and the remainder of the cargo it is considered to be in a peril peculiar to itself, and, if it appears that it would have very shortly been swept overboard by the seas, the act of hastening by jettison the time of its loss is not an act of sacrifice which enables the owner to claim contribution. In the case of the *Adele Thackera* the Court said:

> If the lumber, in the condition which it had come to occupy through a peril of the seas, at the moment when the cutting of the lashings took place, was practically irrecoverable and of no value, then the cutting of the lashings, which was the only voluntary act, did not properly cause the loss of the lumber. Practically it was lost already. The cutting of the lashings did not cause the loss of anything having then any value, and hence would not be a ground of claim. (a)

If, subsequent to a jettison of part of her cargo for the common benefit, a vessel puts into a port of refuge and the voyage is broken up there and the remainder of the cargo, whether sound or damaged, is necessarily disposed of by forced sale, either because the rate of freight from such port to its destination is prohibitive or for

(a) The *Adele Thackera,* Dist. Ct. N. Y. 24 Fed. Rep. 809 (1885).

other sufficient reason, the value to be made good in general average for the cargo jettisoned is to be computed on the basis of the proceeds realized from the forced sale of the remainder. It is presumed that such cargo if it had not been jettisoned would have shared the fate of the cargo which was saved, and there being a separation of interests at the port of refuge it is at that port that the values must be taken. In such a case no allowance is made in general average for freight on the cargo jettisoned, because even if it had been carried on with the remainder to the port of refuge the loss of freight on it would have been due to the inability of the vessel to proceed to her destination, and hence the jettison did not occasion any loss of freight to the shipowner.

Loss of cargo by the action of pumps in efforts to free a vessel of water which enters her in consequence of a leak, although a species of jettison, is not in practice considered a subject for contribution, unless it is possible to determine with some degree of accuracy how much, if any, of the loss is due to the action of the pumps in agitating the water by suction, or otherwise, which may possibly increase the loss by drainage, as apart from that sustained by reason of the cargo being submerged.

A steamer during her voyage to Philadelphia in 1909 encountered very severe weather during which the hatches were burst in by the seas and water got into the hold, in which bags of nitrate were stowed, washing much of the nitrate out of the bags. A large quantity of the nitrate so washed out was pumped overboard with the water by means of the vessel's pumps. Claim was made against the vessel by the cargo owners for contribution in general average for the loss of the nitrate in solution pumped overboard, on the ground that had the vessel brought the nitrate to destination, even though it were in solution or held in suspension, it could have been recovered in whole or in part from the water by

evaporation, but that, owing to the voluntary act of the master in pumping out the hold so that the trim of the vessel might be corrected and she and the remainder of the cargo be enabled to reach port in safety, the nitrate was sacrificed for the common benefit. The claim of the cargo owners, however, was subsequently withdrawn by advice of counsel.

When allowance is made for cargo jettisoned, the loss of freight on such cargo by reason of the jettison is allowed for, as also any damage or loss sustained by the vessel herself as a direct consequence of the jettison.

When a jettison or other sacrifice of cargo is made for the common benefit new cargo is sometimes loaded in the space formerly occupied by the cargo sacrificed. If the original voyage is resumed and completed, the net freight earned on the new cargo should be credited against the allowance for freight on the cargo sacrificed. If the voyage is abandoned and a new one is entered upon, no credit is made in respect of the freight earned on the new voyage.

The owner of cargo jettisoned for the common benefit has a maritime lien on the vessel for the shares payable by her and by her freight, enforceable by proceedings *in rem* (a), but this lien is limited to those shares, and does not extend to those collected by the shipowner from the owners of the cargo saved. (b) If, however, the master neglects to obtain security from the cargo saved, the shipowner becomes liable for the contribution which it should pay, the Court stating in a case of this kind:

> "It is well settled, however, that if the master fails to exercise the lien which by law he has on the goods of all shippers for their just proportion in the general average contribution, and delivers the goods without requiring payment or a general average

(a) Dupont de Nemours & Co. v. Vance, U. S. Sup. Ct. 19 Howard 174 (1856).

(b) The *Allianca,* Dist. Ct. N. Y. 64 Fed. Rep. 871 (1894). Cir. Ct. of App. 79 Fed. Rep. 989 (1895).

bond or other security for the payment thereof, he and the shipowner become personally responsible for the full amount of the general average contribution, which all interests should pay to the persons aggrieved." (a)

For loss of, or damage to, cargo by a jettison, whether from on or under deck, rendered necessary by unseaworthiness of the vessel existing at the commencement of the voyage, she is solely liable.

A provision in a contract of affreightment by which the shipper of the cargo assumes the risk of deck stowage presupposes proper loading and a seaworthy vessel. (b)

If, during the voyage, the cargo becomes heated, as sometimes occurs with coal and other cargoes, and if on that account the vessel, for the common benefit, puts into a port of refuge, and the cargo, or part of it, is discharged, and, on account of liability to spontaneous combustion, it is considered dangerous to reload it, the cargo owner is not entitled to contribution in general average in respect of any loss on the cargo by reason of its being sold or otherwise disposed of, nor the shipowner for loss of freight.

It is considered that the condition of the cargo in such a case renders it impossible for the vessel to carry it to destination as the inherent heat would presumably destroy it before arrival, that no actual sacrifice therefore is made by leaving it at the port of refuge, and that the freight was lost solely because of the condition of the cargo and not by a general average act.

(a) The *Santa Anna,* Cir. Ct. of App. 154 Fed. Rep. 800 (1907).
(b) The *Royal Sceptre,* Dist. Ct. N. Y. 187 Fed. Rep. 228 (1911).

CHAPTER V

VOLUNTARY STRANDING

The *voluntary* stranding of a vessel by her master, to avoid a greater loss or damage to vessel and cargo by an impending peril common to both, is a general average act and fully recognized as such by the Courts, and the damage to vessel or cargo by the stranding (always excluding that previously sustained by sea peril), and expenses incurred and damages done in floating her, are contributed for by the interests saved. (a)

If, in order to avoid an imminent peril common to vessel and cargo, the vessel is voluntarily stranded and in consequence becomes a total loss, but the cargo, or part of it, is thereby saved, such cargo must contribute in general average for the loss of the vessel. (*Columbian Ins. Co. v. Ashby.*) If the positions are reversed, the vessel must contribute for the loss of the cargo.

If a vessel is in danger of being driven ashore and the master, although unable to prevent her stranding, changes her course and strands her at a place which he selects as, in his judgment, less dangerous, and more favorable for saving vessel and cargo, his act is a general average act, and the interests saved thereby must contribute to the loss and damage sustained by such stranding. Similarly, if a vessel at anchor is dragging toward shore in a gale and is in imminent danger of

(a) Columbian Ins. Co. v. Ashby, U. S. Sup. Ct. 13 Peters, 331 (1839).
Barnard v. Adams, U. S. Sup. Ct. 10 Howard 270 (1850).
The *Star of Hope*, U. S. Sup. Ct. 9 Wallace 203 (1869).
Fowler v. Rathbones, U. S. Sup. Ct. 12 Wallace 102 (1870).

going to pieces on rocks, etc., before reaching the shore, and to avoid this danger the master slips the cables and allows her to go ashore, the interests saved must contribute to the loss sustained by vessel or cargo by such stranding (a): the slipping of the cables with the intention of having the vessel driven ashore is a voluntary act.

A vessel at anchor may be in danger of being driven ashore in a gale and if, in order to avoid the impending peril common to vessel and cargo, the master slips the cable with the intention of proceeding out to sea or of stranding the vessel elsewhere, his act in slipping the cable is a general average act; but if, in consequence of the vessel then becoming unmanageable by reason of her sails being blown away or otherwise, she is driven ashore by the wind and sea, the case is not one of voluntary stranding, but is *an accidental stranding in an endeavor to bring about a different result.*

In all cases of voluntary stranding "the volition and election of the master is the essential inquiry, and the degree of injury sustained by the vessel is unimportant." (b)

Where the master of a vessel which was dragging her anchor in a gale and in danger of going ashore (not of sinking in deep water, as was alleged) slipped the cable and stranded her in substantially the same place, under the same conditions and with the same result to the cargo as if she had been driven ashore by the gale, the Court held that the case was not one for general average contribution, on the ground that the voluntary act of the master in slipping the cable was one for the purpose of saving life, and with no other motive, and was of no benefit to the vessel or her cargo. (c)

In the case of the *City of Worcester* the question

(a) Sturgess v. Cary, U. S. Sup. Ct. 2 Curtis 59 (1854).
(b) Rea v. Cutler. 1 Sprague 135 (1846).
(c) Shoe v. Low Moor Iron Co., Cir. Ct. of App. 49 Fed. Rep. 252 (1891).

of voluntary stranding was gone into very fully. The steamer, engaged in carrying passengers and cargo between New York and New London, struck a rock, causing a serious leak forward, and, being in danger of sinking in deep water, the master, in preference to running her upon the rocks in the vicinity, ran her ashore upon what he supposed was a sandy beach which would afford a firm resting place for the vessel, so that her cargo, which was stowed on the deck, would remain uninjured and she be in a better position than if she were run on the rocks. Instead of there being a sandy beach where the vessel was stranded it proved to be soft mud in which she gradually settled forward, in consequence of which the water reached and damaged the cargo. The vessel and cargo were subsequently floated and taken to their destination. It was held by the District Court and affirmed by the Circuit Court of Appeals that the damage to the cargo was a subject of general average contribution. The Court said:

> "It is urged that the striking upon the rock must be the proximate cause of the loss because if the vessel had not turned around she would have sunk in deep water and there could consequently be no other cause of loss than the accident, but to my mind the suggestion lends force to the argument that the original danger of loss was not necessarily the proximate cause of the loss that occurred but that the latter may have originated with the attempt to save. If a loss follows as a natural or inevitable result of the original and involuntary cause of danger then such original cause should be regarded as the proximate cause, but when a voluntary act intervenes, which in itself is a cause of loss, such act being substituted for the original danger of loss with a design of saving, then it would seem that the substituted act should be regarded as the proximate cause for general average purposes. Otherwise there can be no general average recovery in cases of sacrifice to avoid the effects of the original danger." (a)

(a) Norwich and New York Transp. Co. v. Insurance Co. of North America, Dist. Ct. N. Y. 118 Fed. Rep. 307 (1902). Cir. Ct. of App. 129 Fed. Rep. 1006 (1904).

A sacrifice akin to a voluntary stranding takes place when the master exercises his choice of the lesser of two perils threatening the common adventure and, *voluntarily exposing the property to the probability of damage by so doing,* intentionally runs her against a bank of a river or canal or into a wharf or other structure to avoid a greater imminent and impending loss to her and to her cargo by collision with another vessel or otherwise, and the loss and damage so sustained is a proper subject of general average contribution, provided that the necessity for such voluntary act did not arise from negligence of those on board.

The Supreme Court, in referring to a voluntary stranding, but announcing the principle of sacrifice to support a claim for contribution in general average, said:

> "It is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary it is sufficient that the property was selected to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved." (a)

When the York-Antwerp Rules are provided for in the contract of affreightment the damage and loss sustained by the voluntary stranding of a vessel for the common safety are not contributed for when the circumstances are such that, if that course were not adopted, she would "inevitably sink or drive on shore or on rocks." In all other cases under these Rules where a vessel is voluntarily stranded for the common safety the consequent damage and loss are contributed for.

This distinction between those cases where a vessel with her cargo is in imminent danger of sinking, or driving on shore or on rocks, and "all other cases," is sometimes very difficult of application and is quite at variance with the law in the United States, under which,

(a) The *Star of Hope,* U. S. Sup. Ct. 9 Wallace 203 (1869).

as will have been seen, the voluntary stranding of a vessel to avoid inevitable sinking or driving on shore or on rocks is a general average act, the greater and more imminent the danger the more meritorious the sacrifice which is made to avert it. The cases of voluntary stranding, therefore, when York-Antwerp Rules are to be applied, that admit of contribution being claimed it would seem are those to extinguish fire on board, to avoid collision, or those where it can be clearly shown that the vessel would not have inevitably sunk or have driven ashore or on rocks.

York-Antwerp Rule No. 5 is as follows:

> When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

CHAPTER VI

NEGLIGENT STRANDING—UNAVOIDABLE STRANDING

The Courts of the United States hold as a general principle of law that, *in the absence of a valid contract to the contrary,* a shipowner cannot claim contribution from the cargo if the peril to avert which the sacrifice is made, or expenditures incurred, arose from fault or negligence on his part or on the part of his servants, notwithstanding that the sacrifice was of benefit to the cargo as well as to the vessel. The shipowner under such circumstances is looked upon as the wrongdoer, and, as such, is made to bear the entire loss, which, prior to the passage of the Harter Act in 1893, included loss of and damage to cargo resulting from the fault or negligence.

The ordinary stipulations in contracts of affreightment relieving common carriers from responsibility for loss occasioned by the negligence of their servants have been held by the Federal Courts to be void, as opposed to public policy. They neither afford a defense to the shipowner in the matter of claims against him for loss of and damage to cargo arising from negligence, nor do they have the effect—contrary to the rule of law prevailing in England and other countries—of putting him in the position of an innocent party, so as to entitle him to claim contribution from the cargo toward his sacrifices and losses incurred in successful efforts to save both vessel and cargo.

Nor, as will have been seen (*ante,* p. 27), does the Harter Act accomplish that purpose, although it does

relieve the shipowner, provided certain conditions regarding seaworthiness are complied with, from liability for damage or loss to cargo resulting from faults or errors in navigation or in the management of the vessel, and thus modifies the relations which previously existed between the vessel and her cargo.

Therefore, if the stranding of a vessel occurs through *negligent navigation* of master, officers, or crew, no claim, *in the absence of a valid contract to the contrary,* can be maintained by the shipowner against the cargo for contribution. (a)

Damage done to, or expenses incurred in floating, a stranded vessel and her cargo is *prima facie* a general average loss, but, if the stranding occurs in ordinary weather or during a fog, and not from a superior force, and there is no clause in the contract of affreightment whereby the shipowner is entitled to recover contribution from the cargo if negligence of his servants is involved, it is incumbent upon him before he can maintain a claim for contribution to reasonably remove the presumption that the stranding was due to negligent or careless navigation. If he can do this the burden is then shifted from his shoulders to those of the party alleging negligence or carelessness. It is not sufficient for the latter to show an error of judgment on the part of those on board the vessel, but it is necessary to prove that a want of reasonable care and skill was displayed, the question of negligence being determined according to the general rules of navigation.

In the case of the *Nicanor* the Court said:

> "To any action upon such claim, whether backed by a general average bond or not, negligence causing the stranding would

(a) The *Ontario,* Dis. Ct. Mich. 37 Fed. Rep. 220 (1889).
Snow v. Perkins, Dist. Ct. N. Y. 39 Fed. Rep. 334 (1889).
The *Nicanor,* Cir. Ct. N. Y. 44 Fed. Rep. 504 (1890).
Pacific Mail S. S. Co. v. New York, Honduras & Rosario Mining Co., Cir. Ct. of App. 74 Fed. Rep. 564 (1896).
Chrystal v. Flint, Dist. Ct. N. Y. 82 Fed. Rep. 472 (1897).

be a full defense. Nay, more, the ship could not establish such claim upon proof of the bare fact that she stranded; she would have to show sufficient of the attending circumstances to warrant the inference that she stranded without fault." (a)

It was held that where the shipowners neglected to supply the master with proper *charts* for the voyage, which neglect directly contributed to the stranding of the vessel, they were precluded from recovering from the cargo a contribution to their losses and damages incurred in floating her. The shipowners were themselves held in fault. (b)

The Supreme Court of the United States in the recent case of the *Jason* has held valid an agreement in a contract of affreightment which provides that if the shipowner shall have exercised due diligence to make his vessel in all respects seaworthy, and properly manned, equipped, and supplied, the cargo owners shall not be exempted from liability for contribution in general average, notwithstanding that the danger, damage, or disaster resulted from negligent navigation, but with the shipowner shall contribute as if the danger, damage, or disaster had not resulted from negligent navigation. (c) The Court stated as follows:

> "In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the Act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated."

The stranding of a vessel may be due solely to fault or negligence of the *pilot* and the question then arises as

(a) The *Nicanor*, Cir. Ct. N. Y. 44 Fed. Rep. 504 (1890).

(b) Trinidad Shipping & Trading Co. v. Frame Alston & Co., Dist. Ct. N. Y. 88 Fed. Rep. 528 (1898).

(c) The *Jason*, U. S. Sup. Ct. 32 Sup. Ct. Rep. 560 (1912). *See note*, p. 47-48.

to the position of the shipowner in respect of his right to contribution from the cargo toward his losses and damages incurred in successfully floating vessel and cargo.

A pilot, not compulsorily but *voluntarily* employed, is regarded by both the common and maritime law as the servant or agent of the shipowner, and his faults or negligence are attributed to the latter, and so, if a stranding is due wholly or in part to negligence of such a pilot, the shipowner cannot, *in the absence of a valid contract to the contrary,* owing to the pilot being considered as his servant or agent, recover a contribution in general average from the cargo, either in proceedings in admiralty or at common law.

A pilot, whether voluntarily or compulsorily employed, is considered by the *maritime* law of the United States the servant or agent of the *vessel,* and, under this law, *which treats the vessel herself as accountable* irrespective of the agency of the person on board in bringing about the damage, the fault or negligence of the pilot affords no defense to her when proceeded against *in rem* in respect of a disaster occurring in American waters. This doctrine, however, is not applied in actions at common law, or *in personam* in admiralty in such sense that the fault or negligence of a *compulsory* pilot would be treated as imputable to the shipowner himself, so that, in the event that a stranding was due solely to negligence of such a pilot, the shipowner would probably succeed *in a personal action* against the cargo owner, either in the State Courts or in admiralty, owing to the fact that the compulsory pilot would not, in such an action, be considered as the servant or agent of the shipowner. His claim for contribution would not be dependent upon contract nor based on the protection afforded him in the matter of claims *against* him, but on the theory that in the eyes of the law he is an innocent party and comes to the owner of the cargo "with clean hands."

If, however, the stranding through fault or incapacity of a pilot compulsorily employed, and who is in actual control of the navigation of the vessel and not acting in the capacity of adviser only, occurred in British waters, where shipowners and masters are relieved by statute (Sec. 633, Merchant Shipping Act, 1894) of liability for loss or damage occasioned by the pilot's act on the doctrine that he is not their servant or agent, and the vessel herself is not responsible in admiralty where the shipowner would not be at common law, has the shipowner the right to contribution in general average from the cargo toward losses and damages suffered by him in successful efforts to float vessel and cargo, in an action either at common law or *in personam* in admiralty, on their arrival at destination in the United States? Such a case would seem to be even a stronger one from the shipowner's point of view than if the stranding had occurred in American waters and, although the point has not yet been decided by the Courts, it would appear that, as in such cases the shipowner is a stranger to the fault of the pilot and that neither he nor the master, officers nor crew were guilty of negligence *and the vessel herself is not responsible under the foreign law,* the losses and damages sustained by him in floating the vessel and cargo should be adjusted in general average as if there was no question of fault or negligence involved.

On the other hand, it is contended by some that, although the foreign statute protects the shipowner in respect of damage or loss caused by negligence of the compulsory pilot and places the former in the position of an innocent party so far as claims *against* him are concerned, *it must be construed strictly,* and that it has no wider effect and does not *create a right* on his part to recover a contribution from the cargo in general average. They maintain that the vessel herself under the maritime law of the United States is a principal liable

for the negligence of whomsoever, for the time being, is in charge of her navigation, and that the common law doctrine of master and servant cannot be invoked to enable the shipowner in the case of a vessel negligently navigated, whether in foreign or in American waters, by a compulsory pilot, to recover a contribution from the cargo.

If, notwithstanding that the pilot was at fault, there was contributory fault on the part of the shipowner or the master, officers, or crew, the foreign statute above referred to does not apply.

If the stranding is *unavoidable* the shipowner's claim for contribution from the cargo in general average toward his losses and damages sustained in floating the vessel is clear, with or without a special clause in the contract of affreightment, provided they were incurred in saving her and the cargo from an impending peril common to both.

It sometimes happens that a vessel strands in a river or harbor, or other comparatively sheltered place, and the question then arises whether she and her cargo are in a position of common peril while so stranded. If they are not, the expense of floating the vessel is not a subject for general average contribution owing to the absence of such peril. Each case of this kind, however, must be decided upon its merits.

The steamer *Alcona*, with a cargo of 37,000 bushels of corn, left Toledo for Buffalo and, while proceeding down the Maumee River, brought up on the bottom and was unable to get off without assistance; she lay about twenty feet *outside of the channel* and while thus stranded it was deemed advisable to lighten her of a portion of her cargo, which was done, and she was then floated by the assistance of another vessel and by tugboats. The Court said:

> "So far as the facts of this case are concerned, I am satisfied that there is no evidence which would be proper to go to a jury

that the *Alcona* was in any danger of total loss or serious damage to herself or cargo. There is no allegation to that effect in the libel. She lay upon an even keel, upon a bank of sand, clay and mud, several miles from the mouth of the Maumee, protected from the heavy winds and sea of the open lake. A rise in the water would have floated her off without assistance, and it was very improbable that any such fall would occur as would put her in any serious peril. She was a little out of the channel, and there was plenty of room for other vessels to pass without fear of collision. The weather was good, and for all that appears she was as safe as if she were lying at her own dock. * * * We are, then, left to deal with the naked question whether expense incurred in getting off a vessel stranded in a place of safety can be the subject of a general average contribution. * * * If the allowance of general average can be made in the case under consideration, I see no reason why it is not equally allowable whenever a tug or lighter is employed to assist a vessel over a bar at the port of departure or destination, or to relieve a vessel whenever and wherever, in the course of her voyage, she may happen to touch the bottom, be her situation never so safe, if she happens to require assistance to get off. Such a ruling would be extending the doctrine of general average to cases never contemplated by any writer upon maritime law, either in Europe or America, to which my attention has been called." (a)

A steamer while proceeding down the Mississippi River on her voyage to New Orleans with a cargo of cotton sustained serious damage to her machinery, wheel, and rudders, causing her to leak badly, and it was necessary to bring her to the shore and tie her up there. Subsequently the disabled vessel with the cargo on board were towed to New Orleans.

The cargo owners denied liability for a proportion of the cost of such towage, alleging that when the vessel was brought to the shore and tied up the cargo was in no danger and could easily have been reshipped. The Court held that, as the vessel had entirely lost her motive power and was in a leaky condition, not in any port or harbor of refuge, and could only reship, if at all, on transient boats, which the master was not obliged

(a) The *Alcona*, Dist. Ct. Ill. 9 Fed. Rep. 172 (1881).

to do, *she and the cargo as a whole were in peril* and that the extraordinary expense of the towage to destination should be contributed for in general average. (a)

In England the question as to "peril" was raised in 1904 in the case of the *Rodney.* (b) The steamer, while proceeding from Buenos Ayres for London with a cargo of grain and cattle, took the ground in the mud in the River Plate, below Point Indio lightship, and remained aground for about two hours. The engines were worked in efforts to float her and suffered damage in consequence, and the vessel eventually floated when the water rose. The damage to the engines was allowed for in a general average statement and the underwriters on the vessel denied liability on the ground, *inter alia,* that the vessel was at the time in no peril.

The Court found that it was a common thing for vessels to go through the soft mud at Point Indio and for steamers occasionally to ground there, but the evidence was clear that there could be no wind such as would cause damage to a vessel aground, which would not some twelve hours before it reached her have raised the water and so released her. The Court said:

> "It seems, therefore, that although I suppose people would generally say that in anything that can be called an open roadstead, to be aground is to a certain extent to be in peril, yet in this particular place it rather seems that this is not so; it is a place where the water is shallow, where vessels habitually disregard it; they do not appear to wait until there is a southerly wind to raise the water, and it is not in practice considered to be a danger. I think, therefore, on the balance of the evidence, this vessel was not in peril."

The circumstances of the case above mentioned were exceptional and the following comments on it by an English adjuster may be quoted here:

> "There are probably few places other than the River Plate

(a) Sweeney v. Thompson, Cir. Ct. St. Louis. 39 Fed. Rep. 121 (1889).
(b) Shipping Gazette, Nov. 18, 1904.

where a vessel could strand without being in danger; there may certainly be places where vessels might lie aground for a space of time in comparative safety in calm weather, but the possibility of rough weather coming on has always to be considered, and probably only in the River Plate does it happen that the approach of a strong wind has the effect of mitigating instead of increasing the danger."

York-Antwerp Rules Nos. 7 and 8 read as follows:

Rule 7

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule 8

When a ship is ashore, and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

It will be noted that in Rule 7 "a position of peril" is stated as a condition necessary before the damage caused to machinery and boilers in endeavoring to float a vessel can be allowed in general average, and, although not specifically so stated, the same condition as to peril, common to vessel and cargo, must exist before the loss or damage named in Rule 8 can be allowed for.

It is considered that the working of a vessel's engines in efforts to float her is a use of them not only under unusual circumstances, but in an unusual and abnormal way, and damage sustained by them by such working is allowed for in general average.

In respect of damages to the hull *below* the water line the legal presumption is, except in cases of voluntary stranding, that they were *accidentally* caused, and it is only upon evidence removing this presumption that consideration can be had as to whether they were sustained *as a natural consequence* of the measures taken to float the vessel.

The damage may not have been designed or foreseen by the master, but if it was a natural result of these measures it is regarded as an incident to them and, as such, partakes of their voluntary character, but a mere surmise or supposition that it was sustained in "*getting off*" rather than in "*getting on*" or by the accidental pounding of the vessel on the bottom while stranded, is insufficient to warrant allowance in general average.

A careful investigation of all the circumstances is necessary, the *nature* of the damage being usually determined from the evidence given by the master and by the opinion of disinterested experts.

CHAPTER VII

LOSS OF ANCHORS AND CHAINS

To enable recovery to be had in general average for the loss of anchors and chains, it must be shown that they were voluntarily sacrificed at a time of peril for the common benefit, and were not lost *while being put to the use for which they were pledged for the successful navigation of the vessel.*

If an anchor is let go in a gale to prevent a vessel driving or dragging ashore and is lost, its loss, even though anticipated, is not deemed a sacrifice, as under such circumstances it was put to its ordinary and proper use in the navigation of the vessel; and, similarly and for the same reason, if in manœuvering to come to an anchorage a vessel is caught by a current, unexpectedly or otherwise, and an anchor is let go in the usual manner to prevent her from going ashore and is lost, no allowance is made for it in general average.

If, however, a vessel is driving ashore, dragging her anchor, and, in order to prevent the impending loss, the anchor and chain are slipped and she is thereby enabled to gain a place of safety, such loss is a proper subject of general average contribution.

And so, if, in order to escape a common peril which arises suddenly to a vessel at anchor, chains are cut or anchors are slipped, their loss is allowed for. Instances of this kind are the avoiding of collision with another vessel, or to escape from an approaching storm which makes it unsafe for the vessel to remain at anchor where she is, there being danger in the delay which would be necessary to heave in the anchors.

If on attempting to heave in an anchor it is found impossible to do so owing to its being fast among rocks or meeting with other resistance and it is slipped, no contribution is due; if, however, it appears that the anchor could be cleared and hove in if time permitted and it is slipped to avoid a sudden danger common to vessel and cargo, contribution is due. A full investigation of the facts is necessary in all such cases to determine whether a reasonable time would have allowed the recovery of the anchor.

Anchors and chains run out and lost in efforts to float a stranded vessel, or slipped while she is coming afloat, are allowed for in general average.

Another instance of a voluntary loss of an anchor would occur if, to avoid a collision or other imminent peril to vessel and cargo, it is suddenly let go, without the usual precautions for want of time, and is lost. It would be an abnormal use of the anchor, and its loss under the circumstances should be contributed for. The facts in each case of this kind must be fully ascertained, and it must be shown that the loss was one voluntarily assumed by the master for the common benefit of vessel and cargo.

CHAPTER VIII

VESSEL'S FUEL SUPPLY RUNNING SHORT

If at the commencement of the voyage, or at each successive stage of it, a vessel has a proper supply of fuel on board and because of continued bad weather her progress is retarded and the voyage prolonged and she is obliged to put into a port or place for a further supply of fuel to enable her to proceed to destination, or to the next port en route, the extra expenses and loss incurred in doing so are allowed in general average. A "proper supply" means not merely that there must be enough fuel on board to enable the vessel to reach her destination under ordinary weather conditions, but that she must have on board when leaving her last coaling port a reasonable *surplus* supply to meet contingencies, dependent upon the length of the voyage, the season of the year, and the weather likely to be experienced.

In order to establish claims of this nature it is necessary to show:

1. That the vessel had a proper supply of fuel on board at the commencement of the voyage, or at each successive stage of it.

2. That neither the condition of the hull, machinery, boilers, etc., nor the quality of coal, on sailing, conduced in any way to the prolongation of the voyage.

3. That the weather encountered was more than ordinarily severe and such as materially retarded the progress of the vessel.

The steamer *Dunedin* left Cienfuegos, Cuba, early in October with cargo for New York, and her ordinary passage, excluding any specially unfavorable weather, would have been eight days. She left Cuba with 115 tons of coal, a supply for nine and one-half days, but owing to gales and a hurricane the voyage was prolonged and, the coal supply giving out, some of the cargo and ship's materials were burned for fuel during a period of three days to enable the vessel to put into Newport News for a further supply, which port she reached in twelve days after leaving Cienfuegos. The Court said:

> "We agree with the District Judge in his further finding that 115 tons of coal was not a reasonable supply for the voyage, at that season of the year, from Cienfuegos to New York, but that 10 days' supply, or 120 tons, should have been taken in order to comply with the demands of reasonable prudence."

As the vessel had a sufficient supply of coal at the commencement of the voyage for nine and one-half days' steaming it was held that the exceptionally heavy weather experienced was the cause of her having to put into port for a fresh supply and consequently that general average was only chargeable with the loss of cargo and ship's materials burned for fuel during two days, and that the vessel, because of her neglect to take a reasonable supply of coal at the commencement of the voyage, was liable for the loss caused by their being burned during the period, one-half day, that the coal she ought to have had on board would have lasted. It was also held, notwithstanding that the bill of lading gave the vessel the privilege of calling at any port or ports, that in neglecting to take a reasonable supply of coal for the voyage she must be presumed to have taken the risk of having to put into some port to complete the supply. The Court said:

> "The bill of lading, authorizing the vessel 'to call at any port or ports for whatever purpose' was not a provision to enable the vessel to escape from the natural consequences of her own

neglect of duty. The customary voyage was from Cuba directly to New York. It is not reasonable, and the clause cannot be intended to release the ship from the performance of any of her ordinary duties in preparing for the voyage, or to authorize the ship to sail voluntarily from the port of departure with a short supply of coal, and thus deliberately to create a necessity for calling at intermediate ports not mentioned in the bill of lading, and contrary to the customary course of the voyage." (a)

If the failure of a vessel to make her normal speed is due to weak or defective boilers or because of the foul condition of her bottom, no contribution is due toward extra expenses or losses incurred either in putting into port, by using cargo for fuel, or otherwise, and the vessel in such a case is solely liable. (b)

York-Antwerp Rule No. 9 is as follows:

> Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

The extra consumption of fuel to enable a vessel to reach her destination by reason of working the engines as compound instead of triple expansion, as is sometimes done when an accident happens at sea to some part of the machinery, is not the subject of contribution; in these cases there is usually an absence of an imminent common peril and it is considered that the extra consumption of fuel under such circumstances is within the ordinary duty of the vessel to the cargo under the contract of affreightment to carry it safely to its destination by means of the steaming power of the engines.

(a) Hurlbut v. Turnure, Cir. Ct. of App. 81 Fed. Rep. 208 (1897).
(b) The *Abbazzia,* Dist. Ct. N. Y. 127 Fed. Rep. 495 (1904).

CHAPTER IX

BREAKING OF PROPELLER, SHAFT, &c.

It not infrequently happens that some accident to the propeller, shafting, or other part of the machinery of a steamer results in the disabling of the vessel, in consequence of which she is obliged for the common safety to put into, or to be towed into, a port of refuge, or to destination. In such cases, if the damage results from perils of the sea, the expenses, etc., incurred in getting into port and those that are the direct consequences thereof are the subject of general average contribution.

If, however, the breaking of or damage to a shaft, propeller, or other part of the machinery happens in ordinary weather, and there are no circumstances during the voyage sufficient to account for the accident, and the damage is found to be due to a *latent defect,* the question arises whether the shipowner is entitled to contribution from the cargo for the extra expenses incurred for the common safety.

The Supreme Court in the case of the *Caledonia* (a) held that an exception in the bill of lading of "loss or damage from steam boilers and machinery or defects therein" (the word "latent" not being used) did not excuse the vessel for damage to cargo arising from the breaking of the crank-shaft through a latent defect existing at the commencement of the voyage. The Court said:

"The proposition that the warranty of seaworthiness exists

(a) The *Caledonia,* U. S. Sup. Ct. 15 Sup. Ct. Rep. 537 (1895).

by implication in all contracts for sea carriage we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily suspectible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view.

"In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

Before the passage of the Harter Act it was settled law that, in the absence of special contract, there was an implied absolute warranty upon the part of the shipowner that the vessel was seaworthy at the beginning of the voyage. (a) Subsequent to the passage of that Act, and in view of dicta of the Courts that it is competent for the parties *by express contract* to modify the obligations which would otherwise devolve upon the carrier, the following clause, or clauses of similar import, have been incorporated in contracts of affreightment, conforming closely in their wording to that of Section 3 of the Harter Act with regard to the diligence required of the shipowner in the matter of seaworthiness of the vessel:

If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from * * * * * * * * any latent defect in the steamer, her machinery or appurtenances, * * * * * * * * * * whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect * * * * * * was not discoverable by the exercise of due diligence), the consignees or owners of the cargo shall, nevertheless, contribute with the shipowner

(a) The *Edwin I. Morrison,* U. S. Sup. Ct. 14 Sup. Ct. Rep. 833 (1894). The *Caledonia,* U. S. Sup. Ct. 15 Sup. Ct. Rep. 537 (1895).

> in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, and shall pay salvage, and any special charges incurred in respect of the cargo, with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by * * * * * any latent defect * * * * * * *.

"Due diligence," the burden of proving which rests upon the shipowner, means not only that he has exercised it to make the vessel seaworthy, but, also, that there was due diligence, in fact, on the part of all his servants in inspection, maintenance, and repair before the commencement of the voyage and until it is actually commenced; it is not satisfied by mere appointment of competent persons to survey and repair. (a)

By the clauses above referred to, the shipowner being exempted *by contract* from liability for losses due to latent defects in the vessel, even if they existed at time of shipment of the cargo or at the beginning of the voyage, his implied warranty of seaworthiness is modified to that extent, *provided he has used due diligence to make the vessel seaworthy,* and therefore the cargo cannot claim any breach of his obligation to furnish an absolutely seaworthy vessel. This being so, the common peril to which the vessel and cargo were exposed by the breaking of machinery, due to a latent defect, not being one for which the shipowner was responsible, and the Supreme Court having held that the clause is a valid one (b), he is entitled to contribution from the cargo for sacrifices made and expenditures incurred for the com-

(a) The *Friesland,* Dist. Ct. N. Y. 104 Fed. Rep. 99 (1900).
International Nav. Co. v. Farr & Bailey Mfg. Co., U. S. Sup. Ct. 21 Sup. Ct. Rep. 591 (1901).
The *C. W. Elphicke,* Dist. Ct. N. Y. 117 Fed. Rep. 279 (1902).
Ætna Ins. Co. v. Converse, Cir. Ct. of App. 126 Fed. Rep. 742 (1903).
The *Abbazzia,* Dist. Ct. N. Y. 127 Fed. Rep. 495 (1904).

(b) The *Jason,* U. S. Sup. Ct. 32 Sup. Ct. Rep. 560 (1912).

mon benefit, if he can show that due diligence was used to make the vessel seaworthy.

In the absence of a clause in the contract of affreightment relieving the shipowner from his implied warranty of absolute seaworthiness, he has no ground upon which to seek contribution from the cargo if the common peril, to avoid which the sacrifices were made or expenses incurred, was brought about through unseaworthiness due to latent defect.

A *latent defect* has been defined to be one which existed at the time the vessel was built, or the machinery made, and such as was not discovered and could not be discovered by the exercise of known and customary methods of examination.

CHAPTER X

MASTS, SPARS, SAILS, RIGGING, CUT AWAY, CARRYING PRESS OF SAIL, EXCESSIVE USE OF MACHINERY

If, in order to right a disabled vessel to prevent her from foundering or to relieve her from an impending physical peril common to her and to the cargo, masts, spars, sails, rigging, or other parts of the vessel are cut away, or sails are let go to right her, their loss is allowed for in general average, including any further loss or damage which may be sustained by vessel or cargo as a direct and immediate result of the voluntary act of cutting them away.

If the masts or spars have already been broken or sprung, or sails, rigging, etc., have been damaged by sea peril, or are hanging over the side of the vessel before being cut away, allowance is made for their value in damaged condition at the moment they were sacrificed, such value being estimated as if they had been recovered from the sea and stowed in safety on board the vessel. (a) In the case of the *Margarethe Blanca* the Court said:

> "There was, then, the co-existence of the essential elements of a good claim to general average—imminent peril, involving alike the vessel, cargo, and crew; and a voluntary jettison of part of the spars, sails, and rigging, to avoid this peril. But it is earnestly urged that the jettisoned material was 'wreck,' and hence was not voluntarily sacrificed, and is not a legitimate

(a) The *Margarethe Blanca,* Cir. Ct. Penn. 14 Fed. Rep. 59 (1882).
The *Mary Gibbs,* Dist. Ct. Mass. 22 Fed. Rep. 463 (1884).
May v. Keystone Yellow Pine Co., Dist. Ct. Penn. 117 Fed. Rep. 287 (1902).

subject of compensation by general average. In the sense of displacement, and hence of present unadaptedness to a serviceable use, it is properly so described. But it was not useless because it was irrecoverably lost. It remained attached to the vessel by rigging, which was new, strong, and unbroken. If the storm had abated it could certainly have been preserved. If the storm continued and the vessel survived, the weight of the proof is that the jettisoned spars, sails, and rigging would probably have been saved also. But the storm had rendered it, for the time being, useless, and it was a cause of additional and increasing peril to the vessel and cargo. With a probability of its eventual salvage in common with the ship, to avoid the danger impending over both it was cut away and sent adrift. Under these circumstances the property was not valueless; and although its subsequent loss may have been inevitable, this did not divest the casting away of its voluntary character."

The distinction, so far as the question of voluntary sacrifice is concerned, between a case where spars, sails, etc., which have been carried overboard during a storm, but still firmly attached to the vessel by the rigging, are cut away to prevent them from pounding against and staving a hole in her, and a case where cargo adrift on deck is jettisoned, lies in the fact that, whereas in both instances there is a common peril avoided by the cutting away and by the jettison, it can usually be shown in the one case that the spars, sails, rigging, etc., although hanging over the side and in the water, would have been saved even had the storm continued, but that in the other the cargo which was adrift would not have been saved (*ante,* p. 57). If, however, it can be shown that owing to weather conditions the wreckage could not in any event have been saved, no allowance for its loss is due in general average.

In New York the allowances for materials and outfit cut away with broken masts or spars, *subject to the customary deduction of one-third "new for old,"* are as follows:

SAILS.—33 1-3 per cent. of cost to replace (exclusive of cost of sending up and setting in place).

RUNNING RIGGING.—33 1-3 per cent. of cost to replace (exclusive of cost of sending up and setting in place).

STANDING RIGGING.—50 per cent. of cost to replace (exclusive of cost of setting up, but including 50 per cent. of cost of making).

BLOCKS.—70 per cent. of cost to replace.

IRONWORK OF MASTS AND SPARS.—80 per cent. of cost to replace.

MASTS AND SPARS (IRON OR WOOD) NOT BROKEN OR SPRUNG.—100 per cent. of cost to replace (exclusive of cost of sending up and setting in place).

MASTS AND SPARS (IRON OR WOOD) BROKEN OR SPRUNG.—No allowance.

The cost of sending up and setting in place sails and running rigging and of setting up masts, spars, and standing rigging is excluded because the labor involved in this would be necessary whether the wreckage was cut away or not.

When York-Antwerp Rules are provided for in the contract of affreightment no loss or damage caused by cutting away a vessel's materials or outfit when in a state of wreck is allowed for, Rule No. 4 reading:

> Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

When a vessel takes a dangerous list owing to her decks being filled with water, and it becomes necessary to stave a hole in, or to cut away, the bulwarks, to allow the water to run off, the loss occasioned thereby is a subject of contribution.

Damage or loss sustained by a vessel through carrying a press of sail to avoid a lee shore or other impending peril, although at the risk of the sails being carried away, is not the subject of contribution, as such use of the sails is considered to be within the ordinary duty of the vessel in putting them to a use for which they were intended. If, however, a vessel is ashore and sails are set to endeavor to float her, thus being put to an *extraordinary* use, any loss or damage sustained by them is contributed for.

York-Antwerp Rule No. 6, which is in accordance with the practice in the United States, reads:

> Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

A steamer may be driven by heavy gales and seas toward a lee shore or into other positions of danger, and if, to avoid the impending peril to her and to the cargo, the master causes the engines to be worked at their utmost speed to take her out to the open sea and in consequence of the excessive working and racing in accomplishing this they sustain damage, the damage, although voluntary, is not the subject of contribution, as such use of the engines, although at the risk of injury, is considered to be within the ordinary duty of the vessel to her cargo, under the contract of affreightment. Such a case is analogous to one where a press of sail is carried to prevent a vessel from going on a lee shore. If, however, a vessel becomes disabled at sea to such an extent that it becomes necessary to work the engines in an extraordinary manner and an extra strain is put upon them to enable her, at the risk of damage for the common benefit of vessel and cargo, to make port, damage by such extraordinary use, or rather *abuse,* of the engines is properly allowable in general average.

Damage to engines by working them as compound instead of triple expansion, as is sometimes done when an accident happens at sea to some part of the machinery, is not allowed for in general average, as, in addition to the fact that the making of such a change in the engine does not create a situation of common peril, there is no such certainty of a subsequent damage as to make the risk of proceeding, in view of such contingency, a general average sacrifice.

CHAPTER XI

EXTINGUISHING FIRE ON BOARD

Section 4282 of the Revised Statutes of the United States (1851) is as follows:

> No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

Prior to the enactment of this statute the carrier by sea was liable by the common law for loss of or damage by fire to cargo in transit, but relief was extended by Congress for the encouragement of shipping interests in cases of loss by fire occurring accidentally.

By the section quoted above the shipowner, unless the fire is caused by his design or neglect, is not liable for loss of or damage to cargo by fire on board his vessel or by water or other means used to extinguish it, but it does not relieve him from liability to contribute in general average toward damage or loss sustained by cargo in extinguishing the fire. (a)

In the case of the *Roanoke* the Court said:

> "It therefore appears that the adoption of this statute, which is now invoked to relieve the vessel from contribution, found in force these well-known rules, in no respect dependent upon each other, and of separate origin,—the one from the common law, and the other from the maritime law. That from the common law was harsh, imposing upon the contract of carriage an

(a) The *Rapid Transit,* Dist. Ct. Wash. 52 Fed. Rep. 320 (1892). The *Roanoke,* Cir. Ct. of App. 59 Fed. Rep. 161 (1893).

absolute insurance against loss by fire, and clearly within the legislative view for relief; the other, for general average, was an ancient rule of the highest equity, not touching that contract, but applicable only to an emergency of great peril to the whole adventure,—a rule of mutual benefit and value, protecting vessel and cargo when peril arose. The statute makes no mention of general average. The legislative intent was clear to relieve the carrier from the onerous contract liability, for the encouragement of vessel interests; and that intent furnishes the key to the meaning of the statute, unless its language is so broad and unmistakable that it cannot be limited to that purpose. The appellants' contention is that the terms here employed—that the owner 'shall not be liable to answer for or make good' any loss or damage which may happen to merchandise 'by reason or by means of any fire,' in the absence of negligence—must be held to include this damage by wetting of the goods; that, although general average is not allowed for damage by fire, it is here given for the wetting, which was 'by reason' of the fire, and its direct consequence; that the uniform rule of construction which has been applied to policies of insurance against fire, to cover such damage by water as well, must govern here. The basis for general average allowance constitutes the distinction. It is not predicated upon any accidental damage or loss; it is not an indemnity for particular goods from any peril or loss by fire, and cannot arise if the peril is only of this portion, and not common, but accrues only in the case of a voluntary sacrifice of a portion to release the whole adventure from peril of storm, fire, or other stress,—and the sacrifice may be made by jettison, stranding, scuttling, or, as here held, by pouring in water; and contribution is charged upon the beneficiaries as such, whether cargo or vessel, or both. The peril is often such that the vessel must be the subject of sacrifice, either in whole or partial, or must incur extraordinary expense to save the cargo or residue, and then its owner receives the general average contribution. Surely, it cannot have been intended that the vessel should retain this benefit without sharing its burdens. We are of opinion that the general words of this statute do not warrant a construction which would disturb these just and valuable rules, which would tend to discourage impartial conduct by the master in cases of peril, and that this statute does not affect general average."

The owner of a vessel, which, without maritime necessity or just cause, *deviates* from her voyage by his

order, is not relieved from liability for loss of or damage to her cargo by fire during such deviation, either by an exemption of loss by fire in the bill of lading or by Sections 4282-4283 of the Revised Statutes (a), and consequently he could not under such circumstances claim contribution from the cargo toward damage or loss sustained in extinguishing the fire.

Clauses in a bill of lading exempting the carrier from liability for loss or damage arising from fire and water and giving him the benefit of the insurance on the goods, do not exempt the vessel from a general average claim by cargo underwriters for damage caused in extinguishing the fire, the bill of lading only affecting rights and liabilities incident to the contract of carriage. (b)

In the case of the *Santa Anna* the Court said:

> "While the parties to a shipping contract may by clearly expressed terms either enlarge or limit the carrier's liability in respect of general average, it is the settled rule that stipulations in bills of lading exempting the carrier from damages or losses arising from certain specified causes do not affect his liability in general average contribution, although the loss may occur from one or more of the excepted causes so specified." (c)

The loss and damage sustained by vessel or cargo in extinguishing fire is a subject of contribution, whether it be caused by pouring water or forcing steam into the holds, or by voluntarily running the vessel aground and opening the sea-cocks to flood her.

If, however, the extinguishing of the fire and resulting damage to vessel and cargo are done solely by private parties who are strangers to the maritime adventure, or compulsorily by public authorities in the exercise of their municipal or other duties, their object usually being not only to save the vessel and cargo, but also adjacent property, the damage sustained by vessel or cargo in ex-

(a) The *Indrapura,* Dist. Ct. Ore. 171 Fed. Rep. 929 (1909).
(b) The *Roanoke,* Cir. Ct. of App. 59 Fed. Rep. 161 (1893).
(c) The *Santa Anna,* Cir. Ct. of App. 154 Fed. Rep. 800 (1907).

tinguishing the fire under these circumstances has been held not to be a subject of general average contribution. (a) It was held, however, that such damage as was voluntarily occasioned by direction of the master *before* the arrival of the port authorities was to be contributed for.

This decision (*Ralli v. Troop*) has been the cause of much controversy in the adjusting of cases where the port authorities are summoned by the master, or in his absence by the officer in command of the vessel, and thus in control of vessel and cargo, after efforts to extinguish the fire have already been commenced by those on board, it being questioned whether the act of the master or officer in summoning the authorities makes them, in effect, his agents, or if they would have arrived in any event, and whether the master or officer has any control over them in the direction of their efforts to extinguish the fire or how their work should be done. In practice such cases are treated as general average, no attempt being made to distinguish between the damage done before and that done after the arrival of the port authorities.

In a recent case the Court said:

> "The situation evidently did not afford the master an opportunity for exercising a reasonable judgment as to the destruction of property for the benefit of others engaged in the joint adventure. He seemingly was content to allow the Fire Department to perform their duties and did not supervise or interfere with their operations, except in one instance to indicate where holes should be made in the deck to insert the nozzle of the hose. It does not appear, however, that the firemen obeyed any instructions or followed any suggestions of the master." (b)

The Court in referring to the question of authority

(a) Wamsutta Mills v. Old Colony Steamboat Co., Sup. Ct. Mass. 137 Mass. 471 (1884).

Ralli v. Troop, U. S. Sup. Ct. 15 Sup. Ct. Rep. 657 (1895).

(b) Minneapolis, St. P. & B. S. S. Co. v. Manistee Transit Co., Dist. Ct. W. D. N. Y. 156 Fed. Rep. 424 (1907).

and control of the master as regards the fire department quoted the following from the decision of the Supreme Court in the case of *Ralli v. Troop*:

> "In the execution of this office and in the performance of this duty they act under their official responsibility to the public, and are not subject to be controlled by the owners of the adventure, or by the master of the vessel as their representative."

The Court distinguished the case from that of the *Roanoke,* where it was held that, as the fire department *was called into action by the master and he directed the operations of the firemen,* the damage done by them in extinguishing the fire was a proper subject of contribution.

Damage sustained by vessel or cargo by the fire itself, or by smoke, or by scorching, being an accidental and not a voluntary damage, is not allowed for, nor is any allowance made for cargo *on fire* which is damaged by water or steam, on the ground that, so far from doing such cargo any injury, the water or steam poured or forced in is the means of saving whatever value it ultimately realizes; otherwise, it is presumed that such cargo would have been destroyed by the fire.

Cargo damaged by water or steam and also by smoke or by scorching, but which was not on fire, is entitled to allowance to the extent of the injury done to it by the water or steam as apart from damage by the smoke or by the scorching.

Increased damage by smoke forced into cargo by steam used to extinguish a fire is not a subject of contribution, because the means for ascertaining the amount of damage due to the ordinary action of the smoke itself, as apart from the operation of the steam, is too vague and indefinite. (a)

If the fire occurs through spontaneous combustion

(a) Reliance Marine Ins. Co. v. New York & Cuba Mail S. S. Co., Cir. Ct. of App. 77 Fed. Rep. 317 (1896).

due to the inherent quality of the cargo, such as happens sometimes with a cargo of coal, and the owner of such cargo took all necessary precautions before shipping it, and the fire happened without any negligence on his part, he is entitled to recover a contribution in general average for damage done to the cargo in extinguishing the fire, excluding the loss sustained by the portion of such cargo, bulk or otherwise, which was on fire. It is assumed that both the shipowner and shipper were aware of the liability of such cargo to spontaneous combustion, and that both of them knowingly took the risk when the voyage was commenced.

In a recent case fire broke out in a cargo of fertilizer, a dry powder packed in bags, and which had been the subject of transportation for 25 or 30 years, owing, as assumed, to spontaneous combustion, and a portion of it was damaged by water used to extinguish the fire. The shipowner refused to contribute in general average toward the damage to the cargo by water on the ground that the cargo was not in a fit and proper condition for shipment, and that its spontaneous combustion caused the fire, but the Court held that the shippers should not be deprived of the benefit of contribution when the peril is caused by a concealed defect in their shipment equally unknown to them and to the shipowner. (a) The shippers in this case purchased the cargo from the manufacturer, and had nothing to do with its making, bagging, or stowing, and, even if the spontaneous combustion arose from the failure of the manufacturer to properly cure and dry out the cargo, the shippers themselves were innocent parties, and to have had the right to contribution denied them would have been unreasonable.

In the case just referred to it was contended by counsel for the shipowner that, the obligations of contribution in general average being reciprocal, there must

(a) The *Wm. J. Quillan,* Cir. Ct. of App. 180 Fed. Rep. 681 (1910).

be implied an absolute warranty of the fitness of cargo as an offset to the implied absolute warranty of the seaworthiness of the vessel. The Court, however, held that there is no such analogous warranty in the case of cargo.

The extra expense of discharging the cargo is chargeable to general average in so far as the cost is increased because of the condition of cargo damaged by water or steam used to extinguish the fire; the increased cost of discharging at destination cargo damaged by *fire* is a special charge against the freight (whether prepaid or not), it being the duty of the shipowner under his contract not only to carry the cargo to its destination, but also to pay the cost of its discharge, notwithstanding that, because of its damaged condition, the expense thereof is increased.

York-Antwerp Rule No. 3 reads:

> Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

This Rule relates only to the subject of contribution in general average and does not touch the question by whom the voluntary sacrifice must be made. (a)

The words "such portions of the bulk cargo" do not refer to divisions of the cargo by means of temporary or permanent bulkheads so as to constitute the contents of each compartment or hold one "portion," but refer only to so much of the entire cargo as had actually been on fire.

While York-Antwerp Rule No. 3 excludes from allowance in general average damage by water or otherwise to cargo which has " been on fire," such cargo is nevertheless entitled, as also under United States practice,

(a) Ralli v. Troop, U. S. Sup. Ct. 15 Sup. Ct. Rep. 657 (1895).

to a contribution on the basis of its value in damaged condition if sacrificed for the common benefit subsequent to the extinguishing of the fire which burned it. An instance of this kind would occur if, later on during the voyage, it, together with other cargo, had to be jettisoned to relieve the vessel and the remainder from an impending common peril. If, however, such cargo were to become dangerously heated or burst into flames, or, because of its condition, become detrimental to the health of those on board and was jettisoned, no contribution would be due. When the York-Antwerp Rules are not applicable, cargo that has been on fire, but in which all signs of fire had been extinguished when it was further damaged by water or steam in extinguishing fire in proximity to it, is entitled under United States practice to contribution for such further damage.

CHAPTER XII

SALVAGE EXPENSES

The amount paid for successful services rendered to a disabled vessel and her cargo by salvors, when such services are engaged or accepted by the master to save the adventure from an imminent common peril, is apportioned as general average in the same manner as any other extraordinary disbursement voluntarily incurred for the common benefit.

Where the services are voluntary on the part of the salvors, wherein their compensation is dependent upon success (as distinguished from those rendered under contract, as, for instance, when an abandoned vessel and cargo are picked up at sea and brought into port), the amount awarded to the salvors is a special charge on the property saved and does not fall within the principles of general average. A voluntary act on the part of the master for the common benefit of vessel and cargo is a necessary requisite before salvage or other extraordinary expenses can be so treated.

The fact that salvors have separate liens on vessels and cargo, whether their services were voluntary or contracted for, is immaterial in ascertaining whether the salvage expense is of a general average nature or not, the particular circumstances under which it was incurred being the determining factor.

The shipowner may in some cases, by reason of contract or otherwise, be primarily liable, as between him and the salvor, for the whole amount agreed upon for the latter's services to vessel and cargo, but, as neither

he nor the master can bind the owners of the cargo by any contract with the salvor, the whole amount is chargeable to general average only when it can be shown that it was a reasonable one for the services rendered for the common benefit of vessel and cargo.

The following clause is contained in some forms of average agreement:

> Should the value of the services rendered in whole or in part to the cargo be determined by amicable settlement, or by arbitration, we hereby agree to pay, each our rateable proportion of, any sum thus fixed or determined upon; and in the event of an action or suit being brought to recover for such services, we hereby severally agree to give bond therefor in the same manner as if the salvors had required such bond direct from us before surrendering the cargo; and we further agree to pay and fully satisfy any final decree that may be rendered.

The owners of the cargo of a vessel which had been stranded and salved by tugs gave a bond to her owner, the bond covering losses and expenses incurred and to be incurred, which "may be a charge by way of general average or otherwise." The bond also provided that "claims for tug services or otherwise are subject to approval of an insurance company, or settled by arbitration to which they are a party for us."

The cargo owners denied liability for contribution toward the amount paid by the shipowner, and approved by the insurance company, for the salvage services rendered by the tugs to vessel and cargo, alleging that no sum or proportion of a sum voluntarily paid by the shipowner as a salvage award upon all interests can be recovered against the cargo if paid without its knowledge and consent. The Court, however, held that the cargo owners were bound by the settlement made by the shipowner and liable for their proportion of the sum paid by him. (a)

The chief difficulty in determining whether the entire

(a) Morse v. Pomroy Coal Co., Dist. Ct. R. I. 75 Fed. Rep. 428 (1896).

salvage expenses should be paid proportionately by vessel and cargo lies in the fact that, while in many cases the services at first are rendered when all the cargo is on board, the necessities of the situation, as, for instance, with a vessel ashore, require that part of the cargo should be discharged before the vessel with the remainder of the cargo is floated.

It is considered by some that in all such cases the cargo which is discharged and landed in a place of safety or forwarded to destination should be liable only for salvage expenses incurred up to the time it was separated from the vessel and the remainder of the cargo, and that it had then no further interest in those incurred after that time. It has been held by the Courts that the expense of a *continuous* salvage operation, under the direction and authority of the master, is to be apportioned over all the interests saved, irrespective of the fact that one or more of them might be saved at one time and the remainder at another, on the ground that the *community of interest* between vessel and the entire cargo on board at the time of the stranding did not cease merely because during the process of the salvage operations, and as a means toward the ultimate safety of all, a portion of the cargo was discharged and either put in a place of safety or was delivered to its owners. (a)

A ship while on her voyage from Liverpool with cargo for New York stranded, on September 21st, during a gale in the lower harbor at New York, and, although the master employed steamers to endeavor to float her, she remained fast. The *cargo* underwriters, with the knowledge and consent of the ship's agents, on the second day

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(a) Bevan v. Bank of the United States, Sup. Ct. Penn. 4 Whart. 301 (1839).

McAndrews v. Thatcher, U. S. Sup. Ct. 3 Wall. 347 (1865).

Coast Wrecking Co. v. Phoenix Ins. Co., Cir. Ct. N. Y. 13 Fed. Rep. 127 (1882).

The *St. Paul,* Cir. Ct. of App. 86 Fed. Rep. 340 (1898).

after the disaster sent a tug equipped with wrecking apparatus and steam pumps for the purpose of saving, if possible, the ship and cargo, but, after working for two days and failing to float the ship, the cargo, with the exception of a few packages in the lower hold which were not discovered, was discharged into lighters during the next four days and transported to New York, where it was placed in the custody of the agents of the ship, who, upon receiving the usual average bond from the consignees of the cargo, delivered it to them.

Efforts to float the ship, however, were unavailing and, on September 26th, as she had settled in the sand, with the tide ebbing and flowing in her as she lay, and the agents of the ship refused to authorize the incurring of any further expenses, the tug with her wrecking apparatus and steam pumps left, although the master of the ship remained on board. On the next morning the *vessel* underwriters sent their agent to the scene, but the crew refused to do duty and left and four days later the master, being unable to do anything more, abandoned the ship. The agent of the vessel underwriters procured other men and, on November 11th, succeeded in floating the ship and she was towed to New York where the remainder of the cargo, a few damaged packages in the lower hold, was delivered to the consignees.

On a suit by the shipowner against the consignees of the cargo for contribution in general average for the expenses incurred after the master of the ship left her, the Court held that, while the community of extraordinary peril commenced with the stranding of the vessel, it terminated when the master abandoned the ship and left her in charge of the underwriters' agent, after the agents of the ship had declined to authorize any further expenses.

Regarding the question of community of interest, the following is from the opinion of the Supreme Court (*McAndrews v. Thatcher*):

"So, where the cargo consists of various consignments, and the vessel is stranded in the harbor of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others; and yet, if the unlading of the cargo has the effect to make the vessel float, and the whole adventure is saved by one continual, unremitted operation, under the direction of the master, as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril." * * * * * * * * * *

"Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing toward the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures."

The steamer *Seneca* left Havana for New York with cargo consisting mainly of hemp, tobacco, and hides, and, on the following day, at sea, fire was discovered in the hemp in the lower between decks. Water and steam were used in efforts to extinguish the fire, and the vessel returned to Havana, but, as the efforts to extinguish the fire proved unavailing, the master caused the after hatches to be opened and, after discharging as much cargo as possible into lighters, scuttled the vessel. This cargo was sent by the carrier to New York in other vessels and the steamer was subsequently raised and, with the cargo remaining on board, proceeded to New York. One of the owners of cargo which was discharged into lighters, before the vessel was scuttled, and forwarded to New York, objected to contributing toward the expenses of raising the submerged vessel and cargo on the ground, as he alleged, that after his cargo had been placed in the lighters there was a complete and final separation of all interests between the vessel and his

cargo. The Court, however, found that the master expected to raise the vessel, with that portion of the cargo still on board, and to complete the voyage, and that the cargo which was discharged into lighters, though actually separated from the vessel, was still, so far as the general average was concerned, constructively with it, and held that such cargo was chargeable with its proportionate share of salving the scuttled vessel and the remainder of the cargo. (a)

When the entire cargo has been discharged from a stranded vessel *and hope of saving her is abandoned,* the community of interest between vessel and cargo then ceases, and any further expenses incurred solely in the interest of the vessel, and of a character in no way connected with the original expenses, are chargeable to her alone. (b)

The steamer *L'Amérique* stranded on the coast of New Jersey, January 7th, while on a voyage from Havre to New York. Salvage operations were commenced at once and all the cargo, except a very small portion, was discharged without any intention of reloading it and forwarded to destination and delivered to consignees by February 1st, the vessel with about 20 tons of cargo on board not being floated until April 10th. It was held that the community of interest between vessel and cargo ceased with the discharge, the expense of which was a general average charge, but that the subsequent expense of floating the vessel was not a subject of contribution. (c)

The steamer *City of Para* stranded while on a voyage from Central American ports to New York, and, in order to steady her upon the rocks to prevent pounding and having holes knocked in her bottom and consequent loss

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(a) Reliance Marine Ins. Co. v. New York & Cuba Mail S. S. Co., Cir. Ct. of App. 77 Fed. Rep. 317 (1896).

(b) McAndrews v. Thatcher, U. S. Sup. Ct. 3 Wall. 347 (1865).

(c) The *L'Amérique,* Dist. Ct. N. Y. 35 Fed. Rep. 835 (1888).

of the vessel and cargo, the sea-cocks were opened and she was flooded. Some consignees of casks of wine sought to have their goods exempted from contribution to the salvage operations on the ground that the flooding of the vessel was of no possible benefit to their goods and was done solely for the benefit of the vessel, and that had she not been flooded by the voluntary act of the master she would have been flooded in any event through the holes which would have been knocked in her bottom. The Court held that, although the casks of wine were not likely to be injured by the flooding of the vessel, whether done voluntarily or not, the consignees were not entitled to separate it from the general adventure, and that they were liable with the other cargo for contribution to the salvage expenses.

The Court stated as follows:

> "This contention, however, fails to recognize properly one of the essential objects of the voluntary act of the flooding, viz., the preservation of the whole adventure from being broken up, which was thereby accomplished. The master states repeatedly that it was for the safety of all concerned. His expression on cross-examination 'for the safety of the ship' was certainly not intended to mean the safety of the ship without the cargo. To knock out the stern, knock holes through the bottom, and to rip up the plates of an iron steamship would disable her from completing the voyage and break up the adventure. It is the master's right and duty to prevent such a disaster by all reasonable means. In this case his effort was successful; the adventure was preserved intact, the voyage completed, and the cargo brought by the ship to its destined port according to her contract. The defendants as owners of casks of wine not likely to be injured by the flooding of the ship, whether done voluntarily or through holes knocked in the bottom, are not entitled to separate their cargo from the general adventure. Their lots upon the shipment are cast in with the rest, and until a separation of interests is made, or the voyage is so near completion that in view of all the circumstances a separation is legally obligatory upon the master, the inquiry is not what particular act would be for the best interest of each particular part of the cargo separately, but what is best to be done to preserve

the adventure as a whole, for the benefit of the whole. In cases of disaster in distant and comparatively unfrequented regions, it is as a rule far more to the interests of cargo that the adventure shall be saved and the cargo brought home by the ship, rather than to allow the voyage to be broken up, with the risks, delays, expense of salvage and storage, and the chances and expenses of re-shipment, if re-shipment be possible; after all which are paid, but little value may remain to the owner. The authority and duty of the master are based upon these considerations. In the present case the master's act saved all this cargo, from the risks and expenses attendant upon the breaking up of the adventure and therefore, as it seems to me, falls within the general rule." (a)

Specie and bullion, although of little bulk and easily handled, are liable to contribute to salvage expenses proportionately with other cargo *if on board the vessel when the salvage operations are commenced,* notwithstanding that they may be discharged and removed to a place of safety, or delivered, before the vessel is floated with the remainder of the cargo. (b) In the case of the steamer *St. Paul* the Court said:

"About $1,000,000 of the cargo was gold, contained in 21 kegs. The interveners to whom it was consigned insist that salvors should recover only $100, because the gold was conveniently stowed, easily handled, its discharge into the lighter occupying only one hour, and because it paid a high rate of freight. No authority is cited in support of this proposition, except the dictum of Dr. Lushington in The Emma (1844) 2 W. Rob. Adm. 315. The weight of authority, however, is decidedly against differentiating the awards against different kinds of cargo, or relieving specie from bearing its share of the common burden when it is not removed to a place of safety before salvage operations are begun."

If, however, specie or bullion is discharged from a stranded vessel *before salvage operations are com-*

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menced, and is forwarded and delivered to consignees, such a separation is thereby effected from the rest of the adventure as to relieve it from contributing to the salvage expenses. In a case of this kind decided by the Circuit Court of Appeals, the Court said:

> "The case is not one of the removal of cargo from a wrecked ship by installments, where each removal is for the benefit of all the interests. In such a case, the first installment is not relieved from its share of the subsequent expenses because the relations of the owners of the cargo to each other and to the ship have not been changed. In this case, the two facts of intentional and permanent separation from the ship, and a separation not for the safety of the ship or of the rest of the cargo, show that, as to the bullion, there was no continuity of operations, and that the relations of the owner to the rest of the cargo and to the ship had been changed." (a)

When, in the case of a continuous salvage operation, separate awards are decreed by the Court as between vessel and cargo, it is usually because, for one reason or another, separate actions are brought by the salvors, one against the vessel and one against the cargo, but notwithstanding that the awards may even be upon a different basis, because of the peculiar circumstances of the case, it is the practice to apportion the aggregate of the two awards as general average upon vessel and cargo. (b)

If, as sometimes happens, separate agreements or settlements are made with salvors by the owners of vessel and cargo, and that one or more of the parties makes a better settlement than others, such method of procedure is not allowed to disturb this rule.

In the case of the steamer *Jason* the Court said:

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The Court, in the case just referred to, first sustained the shipowner's claim that, although he and the cargo owners had each made separate bargains and had settled with the salvors at different rates, the amounts paid by each should be "brought into the general average adjustment." But the Court having found that the stranding of the vessel was due to negligent navigation and relying on the judgment in the case of the *Irrawaddy* refused to allow a recovery to the shipowner, notwithstanding it was ascertained by an apportionment that he had paid more than his share of the salvage. It thus, for all practical purposes, nullified its decision to that extent and placed the shipowner and cargo owner, to the advantage of the latter, in the same positions *financially,* in regard to the salvage, as if the question of separate bargains had not been involved.

Therefore, in cases where salvage services are rendered for the common benefit of vessel and cargo and it is anticipated by the shipowner that it may be shown that the disaster was due to negligent navigation, it would seem that, in view of the decision above mentioned, if the contract of affreightment does not contain a general average agreement, or unless, before advancing or making himself liable for the cargo's proportion, he obtains an undertaking from the cargo owners for reimbursement, he will leave them to make payment direct to the salvor, for the reason that, in the latter

(a) The *Jason,* Dist. Ct. N. Y. 162 Fed. Rep. 56 (1908). Cir. Ct. of App. 178 Fed. Rep. 414 (1910).

event, they would be unable to recover such payment from the shipowner because of the protection afforded him by the Harter Act.

From the foregoing it will be seen that when the disaster is due to negligent navigation, and a general average agreement is not contained in the contract of affreightment, the shipowner is in a better position if he and the cargo owners each make their payments direct to the salvor, even if at different rates, instead of paying or making himself liable for the entire salvage, as in the latter event he could not, because of the element of negligence, invoke a general average adjustment to recover the cargo's share. It is even doubtful if he could recover it in a direct action, although it would seem that, if due diligence was used to make the vessel in all respects seaworthy, etc., he should be able to do so because of the relief given him by the third section of the Harter Act (*ante,* p. 28).

When a salvage award is made either before or after the arrival of the adventure at destination, upon *approximate* values of vessel and cargo, such valuations do not control in the adjustment, the actual values at the port of destination being those upon which, in practice, the salvage expenses are apportioned.

The fact that the salving and salved vessels belong to the same owner does not preclude him from recovering salvage remuneration from the owners of the salved cargo (a), but the owner of the cargo on a salving vessel is not entitled to share in a salvage award notwithstanding the risk to which it may be subjected. (b)

Seamen, in the event of distress or shipwreck, are bound to exert themselves, without extra compensation, to the utmost to save vessel and cargo and cannot be-

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come salvors unless they have been discharged, or the voyage is terminated by the wreck of the vessel, or she is abandoned by all hands, or by all except the salvors, without hope or expectation of recovery. (a)

The Courts have held that the main factors to be considered in determining the amount of an award for salvage services are:

1. The labor expended by salvors.
2. The promptitude, skill, and energy displayed.
3. The value of the property employed by the salvors and the danger to which such property was exposed.
4. The risk incurred by the salvors.
5. The value of the property saved.
6. The degree of danger from which the property was rescued.

The value of the cargo at risk in a salving vessel, while on a voyage to or from a port in the United States, is not an element to be considered in determining the amount of an award. (See Harter Act, and cases cited, p. 193.)

In a suit for salvage services rendered by a wrecking company to a stranded steamer and her cargo, the amount of salvage awarded by the District Court was determined to be the "value of the services upon the basis of *quantum meruit*" and it awarded an additional sum to the salvors as "extra compensation for their risk and their trouble." The total amount awarded exceeded the total net proceeds of the vessel and cargo.

The Circuit Court of Appeals, however, after referring to some cases where the circumstances were exceptional, held that, as a general proposition, the compensation of salvors is subject to reduction, even below a fair *quantum meruit,* when otherwise nothing would be left for the owner, stating as follows:

"These authorities lend no support to the proposition that

(a) Gilbraith v. Stewart Transp. Co., Cir. Ct. of App. 121 Fed. Rep. 540 (1902).

salvors are to be paid full value, pro opere et labore, although by so doing there is practically nothing left for the owner. On the contrary, the salvage award should be fixed upon due consideration of every element in the case, and the sum actually expended by salvors is but a single element. The salvor risks every dollar thus laid out upon a chance. In the event of complete non-success he loses all. There is no reason why, in the event of partial non-success, he should not lose a part. And it would seem that this principle may with peculiar propriety be applied in the case of a permanent wrecking organization. The volunteer, who on some chance occasion lends valuable aid to a vessel in distress, may never have another opportunity to act as salvor. If ill luck or the strict application of well-recognized rules reduces his award for most meritorious services to a wholly insufficient pittance, it would be a rare stroke of luck which would bring him the opportunity a few months later to salve another vessel, whose value would insure a sum greatly in excess of what it cost to save her. But with a permanent wrecking company there is the constant opportunity for such equalization, especially since the Courts have approved the rule that liberal salvage is to be awarded to such organizations, to encourage professional salvors to maintain expensive plants, and keep their vessels manned and equipped for the rescue of distressed vessels. * * * * * * * * *

"The skill that comes from long experience, joined with more powerful machinery, and devices specially adapted to the purpose in hand, are of more service to an imperiled vessel than is the aid which may be expected from a chance rescuer. To provide such skill, machinery, and appliances, and to keep them always ready for instant service, though they may be called for but occasionally, is now regarded as a meritorious act, calling for a liberal award. * * * * * * * * * * * *

"There was a cash outlay by libelants of over $5,000, made expressly for the prosecution of this particular adventure, and which thus stands on a different footing from the expenditure for wages and maintenance of officers and crews, which would have to go on whether there was a salvage expedition on foot or not. This special expenditure may properly be considered in estimating the amount of award, and, as is stated in the cases cited supra, the salvors should be made whole for what their service cost them, provided that can be done, and a reasonable amount preserved for owners." (a)

(a) The *Lamington*, Cir. Ct. of App. 86 Fed. Rep. 675 (1898).

after the disaster sent a tug equipped with wrecking apparatus and steam pumps for the purpose of saving, if possible, the ship and cargo, but, after working for two days and failing to float the ship, the cargo, with the exception of a few packages in the lower hold which were not discovered, was discharged into lighters during the next four days and transported to New York, where it was placed in the custody of the agents of the ship, who, upon receiving the usual average bond from the consignees of the cargo, delivered it to them.

Efforts to float the ship, however, were unavailing and, on September 26th, as she had settled in the sand, with the tide ebbing and flowing in her as she lay, and the agents of the ship refused to authorize the incurring of any further expenses, the tug with her wrecking apparatus and steam pumps left, although the master of the ship remained on board. On the next morning the *vessel* underwriters sent their agent to the scene, but the crew refused to do duty and left and four days later the master, being unable to do anything more, abandoned the ship. The agent of the vessel underwriters procured other men and, on November 11th, succeeded in floating the ship and she was towed to New York where the remainder of the cargo, a few damaged packages in the lower hold, was delivered to the consignees.

On a suit by the shipowner against the consignees of the cargo for contribution in general average for the expenses incurred after the master of the ship left her, the Court held that, while the community of extraordinary peril commenced with the stranding of the vessel, it terminated when the master abandoned the ship and left her in charge of the underwriters' agent, after the agents of the ship had declined to authorize any further expenses.

Regarding the question of community of interest, the following is from the opinion of the Supreme Court (*McAndrews v. Thatcher*):

"So, where the cargo consists of various consignments, and the vessel is stranded in the harbor of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others; and yet, if the unlading of the cargo has the effect to make the vessel float, and the whole adventure is saved by one continual, unremitted operation, under the direction of the master, as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril." * * * * * * * * * *

"Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing toward the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures."

The steamer *Seneca* left Havana for New York with cargo consisting mainly of hemp, tobacco, and hides, and, on the following day, at sea, fire was discovered in the hemp in the lower between decks. Water and steam were used in efforts to extinguish the fire, and the vessel returned to Havana, but, as the efforts to extinguish the fire proved unavailing, the master caused the after hatches to be opened and, after discharging as much cargo as possible into lighters, scuttled the vessel. This cargo was sent by the carrier to New York in other vessels and the steamer was subsequently raised and, with the cargo remaining on board, proceeded to New York. One of the owners of cargo which was discharged into lighters, before the vessel was scuttled, and forwarded to New York, objected to contributing toward the expenses of raising the submerged vessel and cargo on the ground, as he alleged, that after his cargo had been placed in the lighters there was a complete and final separation of all interests between the vessel and his

cargo. The Court, however, found that the master expected to raise the vessel, with that portion of the cargo still on board, and to complete the voyage, and that the cargo which was discharged into lighters, though actually separated from the vessel, was still, so far as the general average was concerned, constructively with it, and held that such cargo was chargeable with its proportionate share of salving the scuttled vessel and the remainder of the cargo. (a)

When the entire cargo has been discharged from a stranded vessel *and hope of saving her is abandoned,* the community of interest between vessel and cargo then ceases, and any further expenses incurred solely in the interest of the vessel, and of a character in no way connected with the original expenses, are chargeable to her alone. (b)

The steamer *L'Amérique* stranded on the coast of New Jersey, January 7th, while on a voyage from Havre to New York. Salvage operations were commenced at once and all the cargo, except a very small portion, was discharged without any intention of reloading it and forwarded to destination and delivered to consignees by February 1st, the vessel with about 20 tons of cargo on board not being floated until April 10th. It was held that the community of interest between vessel and cargo ceased with the discharge, the expense of which was a general average charge, but that the subsequent expense of floating the vessel was not a subject of contribution. (c)

The steamer *City of Para* stranded while on a voyage from Central American ports to New York, and, in order to steady her upon the rocks to prevent pounding and having holes knocked in her bottom and consequent loss

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(a) Reliance Marine Ins. Co. v. New York & Cuba Mail S. S. Co., Cir. Ct. of App. 77 Fed. Rep. 317 (1896).

(b) McAndrews v. Thatcher, U. S. Sup. Ct. 3 Wall. 347 (1865).

(c) The *L'Amérique,* Dist. Ct. N. Y. 35 Fed. Rep. 835 (1888).

of the vessel and cargo, the sea-cocks were opened and she was flooded. Some consignees of casks of wine sought to have their goods exempted from contribution to the salvage operations on the ground that the flooding of the vessel was of no possible benefit to their goods and was done solely for the benefit of the vessel, and that had she not been flooded by the voluntary act of the master she would have been flooded in any event through the holes which would have been knocked in her bottom. The Court held that, although the casks of wine were not likely to be injured by the flooding of the vessel, whether done voluntarily or not, the consignees were not entitled to separate it from the general adventure, and that they were liable with the other cargo for contribution to the salvage expenses.

The Court stated as follows:

> "This contention, however, fails to recognize properly one of the essential objects of the voluntary act of the flooding, viz., the preservation of the whole adventure from being broken up, which was thereby accomplished. The master states repeatedly that it was for the safety of all concerned. His expression on cross-examination 'for the safety of the ship' was certainly not intended to mean the safety of the ship without the cargo. To knock out the stern, knock holes through the bottom, and to rip up the plates of an iron steamship would disable her from completing the voyage and break up the adventure. It is the master's right and duty to prevent such a disaster by all reasonable means. In this case his effort was successful; the adventure was preserved intact, the voyage completed, and the cargo brought by the ship to its destined port according to her contract. The defendants as owners of casks of wine not likely to be injured by the flooding of the ship, whether done voluntarily or through holes knocked in the bottom, are not entitled to separate their cargo from the general adventure. Their lots upon the shipment are cast in with the rest, and until a separation of interests is made, or the voyage is so near completion that in view of all the circumstances a separation is legally obligatory upon the master, the inquiry is not what particular act would be for the best interest of each particular part of the cargo separately, but what is best to be done to preserve

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When, in the case of a continuous salvage operation, separate awards are decreed by the Court as between vessel and cargo, it is usually because, for one reason or another, separate actions are brought by the salvors, one against the vessel and one against the cargo, but notwithstanding that the awards may even be upon a different basis, because of the peculiar circumstances of the case, it is the practice to apportion the aggregate of the two awards as general average upon vessel and cargo. (b)

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The Court, in the case just referred to, first sustained the shipowner's claim that, although he and the cargo owners had each made separate bargains and had settled with the salvors at different rates, the amounts paid by each should be "brought into the general average adjustment." But the Court having found that the stranding of the vessel was due to negligent navigation and relying on the judgment in the case of the *Irrawaddy* refused to allow a recovery to the shipowner, notwithstanding it was ascertained by an apportionment that he had paid more than his share of the salvage. It thus, for all practical purposes, nullified its decision to that extent and placed the shipowner and cargo owner, to the advantage of the latter, in the same positions *financially,* in regard to the salvage, as if the question of separate bargains had not been involved.

Therefore, in cases where salvage services are rendered for the common benefit of vessel and cargo and it is anticipated by the shipowner that it may be shown that the disaster was due to negligent navigation, it would seem that, in view of the decision above mentioned, if the contract of affreightment does not contain a general average agreement, or unless, before advancing or making himself liable for the cargo's proportion, he obtains an undertaking from the cargo owners for reimbursement, he will leave them to make payment direct to the salvor, for the reason that, in the latter

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From the foregoing it will be seen that when the disaster is due to negligent navigation, and a general average agreement is not contained in the contract of affreightment, the shipowner is in a better position if he and the cargo owners each make their payments direct to the salvor, even if at different rates, instead of paying or making himself liable for the entire salvage, as in the latter event he could not, because of the element of negligence, invoke a general average adjustment to recover the cargo's share. It is even doubtful if he could recover it in a direct action, although it would seem that, if due diligence was used to make the vessel in all respects seaworthy, etc., he should be able to do so because of the relief given him by the third section of the Harter Act (*ante,* p. 28).

When a salvage award is made either before or after the arrival of the adventure at destination, upon *approximate* values of vessel and cargo, such valuations do not control in the adjustment, the actual values at the port of destination being those upon which, in practice, the salvage expenses are apportioned.

The fact that the salving and salved vessels belong to the same owner does not preclude him from recovering salvage remuneration from the owners of the salved cargo (a), but the owner of the cargo on a salving vessel is not entitled to share in a salvage award notwithstanding the risk to which it may be subjected. (b)

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(b) The *Brixham,* Dist. Ct. Virg. 54 Fed. Rep. 539 (1893).

he nor the master can bind the owners of the cargo by any contract with the salvor, the whole amount is chargeable to general average only when it can be shown that it was a reasonable one for the services rendered for the common benefit of vessel and cargo.

The following clause is contained in some forms of average agreement:

> Should the value of the services rendered in whole or in part to the cargo be determined by amicable settlement, or by arbitration, we hereby agree to pay, each our rateable proportion of, any sum thus fixed or determined upon; and in the event of an action or suit being brought to recover for such services, we hereby severally agree to give bond therefor in the same manner as if the salvors had required such bond direct from us before surrendering the cargo; and we further agree to pay and fully satisfy any final decree that may be rendered.

The owners of the cargo of a vessel which had been stranded and salved by tugs gave a bond to her owner, the bond covering losses and expenses incurred and to be incurred, which "may be a charge by way of general average or otherwise." The bond also provided that "claims for tug services or otherwise are subject to approval of an insurance company, or settled by arbitration to which they are a party for us."

The cargo owners denied liability for contribution toward the amount paid by the shipowner, and approved by the insurance company, for the salvage services rendered by the tugs to vessel and cargo, alleging that no sum or proportion of a sum voluntarily paid by the shipowner as a salvage award upon all interests can be recovered against the cargo if paid without its knowledge and consent. The Court, however, held that the cargo owners were bound by the settlement made by the shipowner and liable for their proportion of the sum paid by him. (a)

The chief difficulty in determining whether the entire

(a) Morse v. Pomroy Coal Co., Dist. Ct. R. I. 75 Fed. Rep. 428 (1896).

salvage expenses should be paid proportionately by vessel and cargo lies in the fact that, while in many cases the services at first are rendered when all the cargo is on board, the necessities of the situation, as, for instance, with a vessel ashore, require that part of the cargo should be discharged before the vessel with the remainder of the cargo is floated.

It is considered by some that in all such cases the cargo which is discharged and landed in a place of safety or forwarded to destination should be liable only for salvage expenses incurred up to the time it was separated from the vessel and the remainder of the cargo, and that it had then no further interest in those incurred after that time. It has been held by the Courts that the expense of a *continuous* salvage operation, under the direction and authority of the master, is to be apportioned over all the interests saved, irrespective of the fact that one or more of them might be saved at one time and the remainder at another, on the ground that the *community of interest* between vessel and the entire cargo on board at the time of the stranding did not cease merely because during the process of the salvage operations, and as a means toward the ultimate safety of all, a portion of the cargo was discharged and either put in a place of safety or was delivered to its owners. (a)

A ship while on her voyage from Liverpool with cargo for New York stranded, on September 21st, during a gale in the lower harbor at New York, and, although the master employed steamers to endeavor to float her, she remained fast. The *cargo* underwriters, with the knowledge and consent of the ship's agents, on the second day

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(a) Bevan v. Bank of the United States, Sup. Ct. Penn. 4 Whart. 301 (1839).

McAndrews v. Thatcher, U. S. Sup. Ct. 3 Wall. 347 (1865).

Coast Wrecking Co. v. Phoenix Ins. Co., Cir. Ct. N. Y. 13 Fed. Rep. 127 (1882).

The *St. Paul,* Cir. Ct. of App. 86 Fed. Rep. 340 (1898).

after the disaster sent a tug equipped with wrecking apparatus and steam pumps for the purpose of saving, if possible, the ship and cargo, but, after working for two days and failing to float the ship, the cargo, with the exception of a few packages in the lower hold which were not discovered, was discharged into lighters during the next four days and transported to New York, where it was placed in the custody of the agents of the ship, who, upon receiving the usual average bond from the consignees of the cargo, delivered it to them.

Efforts to float the ship, however, were unavailing and, on September 26th, as she had settled in the sand, with the tide ebbing and flowing in her as she lay, and the agents of the ship refused to authorize the incurring of any further expenses, the tug with her wrecking apparatus and steam pumps left, although the master of the ship remained on board. On the next morning the *vessel* underwriters sent their agent to the scene, but the crew refused to do duty and left and four days later the master, being unable to do anything more, abandoned the ship. The agent of the vessel underwriters procured other men and, on November 11th, succeeded in floating the ship and she was towed to New York where the remainder of the cargo, a few damaged packages in the lower hold, was delivered to the consignees.

On a suit by the shipowner against the consignees of the cargo for contribution in general average for the expenses incurred after the master of the ship left her, the Court held that, while the community of extraordinary peril commenced with the stranding of the vessel, it terminated when the master abandoned the ship and left her in charge of the underwriters' agent, after the agents of the ship had declined to authorize any further expenses.

Regarding the question of community of interest, the following is from the opinion of the Supreme Court (*McAndrews v. Thatcher*):

"So, where the cargo consists of various consignments, and the vessel is stranded in the harbor of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others; and yet, if the unlading of the cargo has the effect to make the vessel float, and the whole adventure is saved by one continual, unremitted operation, under the direction of the master, as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril." * * * * * * * * * *

"Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing toward the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures."

The steamer *Seneca* left Havana for New York with cargo consisting mainly of hemp, tobacco, and hides, and, on the following day, at sea, fire was discovered in the hemp in the lower between decks. Water and steam were used in efforts to extinguish the fire, and the vessel returned to Havana, but, as the efforts to extinguish the fire proved unavailing, the master caused the after hatches to be opened and, after discharging as much cargo as possible into lighters, scuttled the vessel. This cargo was sent by the carrier to New York in other vessels and the steamer was subsequently raised and, with the cargo remaining on board, proceeded to New York. One of the owners of cargo which was discharged into lighters, before the vessel was scuttled, and forwarded to New York, objected to contributing toward the expenses of raising the submerged vessel and cargo on the ground, as he alleged, that after his cargo had been placed in the lighters there was a complete and final separation of all interests between the vessel and his

cargo. The Court, however, found that the master expected to raise the vessel, with that portion of the cargo still on board, and to complete the voyage, and that the cargo which was discharged into lighters, though actually separated from the vessel, was still, so far as the general average was concerned, constructively with it, and held that such cargo was chargeable with its proportionate share of salving the scuttled vessel and the remainder of the cargo. (a)

When the entire cargo has been discharged from a stranded vessel *and hope of saving her is abandoned,* the community of interest between vessel and cargo then ceases, and any further expenses incurred solely in the interest of the vessel, and of a character in no way connected with the original expenses, are chargeable to her alone. (b)

The steamer *L'Amérique* stranded on the coast of New Jersey, January 7th, while on a voyage from Havre to New York. Salvage operations were commenced at once and all the cargo, except a very small portion, was discharged without any intention of reloading it and forwarded to destination and delivered to consignees by February 1st, the vessel with about 20 tons of cargo on board not being floated until April 10th. It was held that the community of interest between vessel and cargo ceased with the discharge, the expense of which was a general average charge, but that the subsequent expense of floating the vessel was not a subject of contribution. (c)

The steamer *City of Para* stranded while on a voyage from Central American ports to New York, and, in order to steady her upon the rocks to prevent pounding and having holes knocked in her bottom and consequent loss

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(a) Reliance Marine Ins. Co. v. New York & Cuba Mail S. S. Co., Cir. Ct. of App. 77 Fed. Rep. 317 (1896).

(b) McAndrews v. Thatcher, U. S. Sup. Ct. 3 Wall. 347 (1865).

(c) The *L'Amérique,* Dist. Ct. N. Y. 35 Fed. Rep. 835 (1888).

of the vessel and cargo, the sea-cocks were opened and she was flooded. Some consignees of casks of wine sought to have their goods exempted from contribution to the salvage operations on the ground that the flooding of the vessel was of no possible benefit to their goods and was done solely for the benefit of the vessel, and that had she not been flooded by the voluntary act of the master she would have been flooded in any event through the holes which would have been knocked in her bottom. The Court held that, although the casks of wine were not likely to be injured by the flooding of the vessel, whether done voluntarily or not, the consignees were not entitled to separate it from the general adventure, and that they were liable with the other cargo for contribution to the salvage expenses.

The Court stated as follows:

> "This contention, however, fails to recognize properly one of the essential objects of the voluntary act of the flooding, viz., the preservation of the whole adventure from being broken up, which was thereby accomplished. The master states repeatedly that it was for the safety of all concerned. His expression on cross-examination 'for the safety of the ship' was certainly not intended to mean the safety of the ship without the cargo. To knock out the stern, knock holes through the bottom, and to rip up the plates of an iron steamship would disable her from completing the voyage and break up the adventure. It is the master's right and duty to prevent such a disaster by all reasonable means. In this case his effort was successful; the adventure was preserved intact, the voyage completed, and the cargo brought by the ship to its destined port according to her contract. The defendants as owners of casks of wine not likely to be injured by the flooding of the ship, whether done voluntarily or through holes knocked in the bottom, are not entitled to separate their cargo from the general adventure. Their lots upon the shipment are cast in with the rest, and until a separation of interests is made, or the voyage is so near completion that in view of all the circumstances a separation is legally obligatory upon the master, the inquiry is not what particular act would be for the best interest of each particular part of the cargo separately, but what is best to be done to preserve

the adventure as a whole, for the benefit of the whole. In cases of disaster in distant and comparatively unfrequented regions, it is as a rule far more to the interests of cargo that the adventure shall be saved and the cargo brought home by the ship, rather than to allow the voyage to be broken up, with the risks, delays, expense of salvage and storage, and the chances and expenses of re-shipment, if re-shipment be possible; after all which are paid, but little value may remain to the owner. The authority and duty of the master are based upon these considerations. In the present case the master's act saved all this cargo from the risks and expenses attendant upon the breaking up of the adventure and therefore, as it seems to me, falls within the general rule." (a)

Specie and bullion, although of little bulk and easily handled, are liable to contribute to salvage expenses proportionately with other cargo *if on board the vessel when the salvage operations are commenced,* notwithstanding that they may be discharged and removed to a place of safety, or delivered, before the vessel is floated with the remainder of the cargo. (b) In the case of the steamer *St. Paul* the Court said:

"About $1,000,000 of the cargo was gold, contained in 21 kegs. The interveners to whom it was consigned insist that salvors should recover only $100, because the gold was conveniently stowed, easily handled, its discharge into the lighter occupying only one hour, and because it paid a high rate of freight. No authority is cited in support of this proposition, except the dictum of Dr. Lushington in The Emma (1844) 2 W. Rob. Adm. 315. The weight of authority, however, is decidedly against differentiating the awards against different kinds of cargo, or relieving specie from bearing its share of the common burden when it is not removed to a place of safety before salvage operations are begun."

If, however, specie or bullion is discharged from a stranded vessel *before salvage operations are com-*

(a) Pacific Mail S. S. Co. v. Dupré et al., Dist. Ct. N. Y. 74 Fed. Rep. 250 (1896).

(b) Bevan v. Bank of the United States, Sup. Ct. Penn. 4 Whart. 301 (1839).

The *St. Paul,* Cir. Ct. of App. 86 Fed. Rep. 340 (1898).

menced, and is forwarded and delivered to consignees, such a separation is thereby effected from the rest of the adventure as to relieve it from contributing to the salvage expenses. In a case of this kind decided by the Circuit Court of Appeals, the Court said:

> "The case is not one of the removal of cargo from a wrecked ship by installments, where each removal is for the benefit of all the interests. In such a case, the first installment is not relieved from its share of the subsequent expenses because the relations of the owners of the cargo to each other and to the ship have not been changed. In this case, the two facts of intentional and permanent separation from the ship, and a separation not for the safety of the ship or of the rest of the cargo, show that, as to the bullion, there was no continuity of operations, and that the relations of the owner to the rest of the cargo and to the ship had been changed." (a)

When, in the case of a continuous salvage operation, separate awards are decreed by the Court as between vessel and cargo, it is usually because, for one reason or another, separate actions are brought by the salvors, one against the vessel and one against the cargo, but notwithstanding that the awards may even be upon a different basis, because of the peculiar circumstances of the case, it is the practice to apportion the aggregate of the two awards as general average upon vessel and cargo. (b)

If, as sometimes happens, separate agreements or settlements are made with salvors by the owners of vessel and cargo, and that one or more of the parties makes a better settlement than others, such method of procedure is not allowed to disturb this rule.

In the case of the steamer *Jason* the Court said:

> "It seems to me, therefore, that this salvage expense, however or whenever liquidated, was something done for common

(a) Pacific Mail S. S. Co. v. New York, Honduras & Rosario Mining Co., Cir. Ct. of App. 74 Fed. Rep. 564 (1896).

(b) The *Col. Adams,* Dist. Ct. N. Y. 19 Fed. Rep. 795 (1884)
The *Jason,* Dist Ct. N. Y. 162 Fed. Rep. 56 (1908).

> benefit and therefore should under American law be brought into the general average adjustment. * * * * * * * * * * The test in general average is not what it was worth to each interest to procure its own salvation. That is no more to the point than the fact that some shippers of goods may prefer them to be lost rather than saved. The test is whether there was in law a voluntary sacrifice for the common benefit, and the moment salvage is paid or agreed to be paid on goods saved with the vessel, such sacrifice exists." (a)

The Court, in the case just referred to, first sustained the shipowner's claim that, although he and the cargo owners had each made separate bargains and had settled with the salvors at different rates, the amounts paid by each should be "brought into the general average adjustment." But the Court having found that the stranding of the vessel was due to negligent navigation and relying on the judgment in the case of the *Irrawaddy* refused to allow a recovery to the shipowner, notwithstanding it was ascertained by an apportionment that he had paid more than his share of the salvage. It thus, for all practical purposes, nullified its decision to that extent and placed the shipowner and cargo owner, to the advantage of the latter, in the same positions *financially,* in regard to the salvage, as if the question of separate bargains had not been involved.

Therefore, in cases where salvage services are rendered for the common benefit of vessel and cargo and it is anticipated by the shipowner that it may be shown that the disaster was due to negligent navigation, it would seem that, in view of the decision above mentioned, if the contract of affreightment does not contain a general average agreement, or unless, before advancing or making himself liable for the cargo's proportion, he obtains an undertaking from the cargo owners for reimbursement, he will leave them to make payment direct to the salvor, for the reason that, in the latter

(a) The *Jason,* Dist. Ct. N. Y. 162 Fed. Rep. 56 (1908). Cir. Ct. of App. 178 Fed. Rep. 414 (1910).

event, they would be unable to recover such payment from the shipowner because of the protection afforded him by the Harter Act.

From the foregoing it will be seen that when the disaster is due to negligent navigation, and a general average agreement is not contained in the contract of affreightment, the shipowner is in a better position if he and the cargo owners each make their payments direct to the salvor, even if at different rates, instead of paying or making himself liable for the entire salvage, as in the latter event he could not, because of the element of negligence, invoke a general average adjustment to recover the cargo's share. It is even doubtful if he could recover it in a direct action, although it would seem that, if due diligence was used to make the vessel in all respects seaworthy, etc., he should be able to do so because of the relief given him by the third section of the Harter Act (*ante,* p. 28).

When a salvage award is made either before or after the arrival of the adventure at destination, upon *approximate* values of vessel and cargo, such valuations do not control in the adjustment, the actual values at the port of destination being those upon which, in practice, the salvage expenses are apportioned.

The fact that the salving and salved vessels belong to the same owner does not preclude him from recovering salvage remuneration from the owners of the salved cargo (a), but the owner of the cargo on a salving vessel is not entitled to share in a salvage award notwithstanding the risk to which it may be subjected. (b)

Seamen, in the event of distress or shipwreck, are bound to exert themselves, without extra compensation, to the utmost to save vessel and cargo and cannot be-

(a) A lot of whalebone, Dist. Ct. Calif. 51 Fed. Rep. 916 (1892).
Gilchrist Transp. Co. v. 110,000 bushels of No. 1 Northern Wheat, Dist. Ct. N. Y. 120 Fed. Rep. 432 (1903).

(b) The *Brixham,* Dist. Ct. Virg. 54 Fed. Rep. 539 (1893).

When the cost of discharging and reloading cargo is allowable in general average, any damage to or loss of the cargo arising from such operations is also allowed for in the general average, but damage or loss by *fire* on cargo while in store is not, in practice, the subject of contribution. It is a generally accepted principle that damage sustained by cargo through *climatic conditions* at a port of refuge, solely by *delay,* is not recoverable in general average, and if cargo is so damaged because of exposure to the elements when discharged for the common benefit, but would have suffered to the same extent if it had not been discharged, no allowance is made. But, if the damage because of such exposure would not have occurred if the cargo had remained on board, the damage is allowed for in general average.

As regards the right and circumstances under which the owner of the cargo can demand his property at a port of refuge, the following remarks by the Supreme Court will be found of interest:

> "It is contended, however, that the owner of the cargo has no right to demand his property at an intermediate port unless the voyage has been actually abandoned or the necessary repairs on the vessel cannot be effected. The cargo owner is not bound to help the vessel through with her voyage under all circumstances. It is the duty of the vessel owner, and of the master as his appointed agent, to do all that in good faith ought to be done to carry the cargo to its place of destination, and for that purpose the cargo owner should contribute to the expense as far as his interests may apparently require, but he is under no obligation to sacrifice his cargo, or to allow it to be sacrificed, for the benefit of the vessel alone. He ought to do what good faith toward the vessel demands, but need not do more. If he would lose no more by helping the vessel in her distress than he would by taking his property and disposing of it in some other way, he should, if the vessel owner or the master requires it, furnish the help or allow the cargo to be used for that purpose. To that extent he is bound to the vessel in her distress, but no further. When, therefore, a cargo owner finds a vessel, with his cargo on board, at a port of refuge needing repairs which cannot be effected without a cost

to him of more than he would lose by taking his property at that place and paying the vessel all her lawful charges against him, we do not doubt that he may pay the charges and reclaim the property. Otherwise he would be compelled to submit to a sacrifice of his own interests for the benefit of others, and that the law does not require. What charges must be paid will depend on the circumstances of the case. Sometimes they may include full freight, expenses at the port of refuge, general average charges, and possibly more and sometimes less; but upon full payment of such as are in law demandable the cargo must be surrendered." (a)

York-Antwerp Rule 12

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

It is to be noted that under Rule 12 the allowance is restricted to damage to, or loss of, cargo "*necessarily caused in the act of*" discharging, storing, reloading, and stowing, as distinguished from damage or loss it might sustain during the period of storage. If, however, cargo discharged is placed in lighters, or on the beach, or in other *exposed* place, and sustains damage or loss while there, such consequential damage or loss would, under the above-mentioned Rule, be allowed in general average on the ground that the risk to the cargo by being put there could be considered as fairly within the prior contemplation of the master when he elected to discharge it, and that such damage or loss was "necessarily caused in the act of discharging and storing." If the cargo discharged is placed in store or warehouse, or in other place where cargo is *customarily* stored, and is lost or damaged while there, such loss or damage would not ordinarily be the subject of contribution either under York-Antwerp Rules or under the laws and usages prevailing in this country.

(a) Bank of St. Thomas v. the *Julia Blake,* U. S. Sup. Ct. 2 Sup. Ct. Rep. 702 (1883).

CHAPTER XIV

VESSEL IN BALLAST

In considering voluntary sacrifices, or extraordinary expenditures incurred, at a time of peril, the rule is to make no distinction whether the vessel is carrying cargo or not (a), or whether she be yacht (b), tugboat, lighter, barge, or other class of vessel. The same principles prevail and the loss or damage is adjusted as general average.

It is only, however, in cases where there is insurance on the vessel that these principles are applied and the loss so adjusted, and it is done on the ground that contribution is required by those benefited by the sacrifices or expenditure, and that the insurer, whether under a voyage or time policy, being interested with the owner in the saving of the vessel, should contribute in proportion as he is benefited, *his obligation to contribute depending solely upon the nature of the sacrifice.*

In the case of *Potter v. Ocean Ins. Co.* the Court said:

> "As I understand it, the phrase 'general average' as found in our policies of insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage; and not merely an involuntary encounter

(a) Potter v. Ocean Ins. Co., Cir. Ct. Mass. 3 Sum. 27 (1837).
Peters v. Warren Ins. Co. 3 Sum. 389 (1838)
Greeley v. Tremont Ins. Co. 9 Cush. 415 (1852).
La Fonciere Compagnie v. Dollar, Cir. Ct. of App. 181 Fed. Rep. 945 (1910).

(b) Risley v. The Insurance Company of North America, Dist. Ct. N. Y. 189 Fed. Rep. 529 (1910).

of a loss, without action or design * * * * * * * * * * It looks to the consideration, whether the act is intended for the benefit of all concerned in the voyage; and not in particular to the consideration, who are to contribute to the indemnity. To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction; for it is (then) a purely speculative enquiry. Not so, when there is insurance, for in such a case the underwriters are *pro tanto* benefited by the sacrifice or other act done; and they are in a just sense bound to contribute to it * * * * * * * * * Suppose an empty ship, which is insured, is dismantled in a storm and is compelled to put away into a port of necessity, in order to repair; or otherwise she must be abandoned at sea; are not the expenses of the voyage, in such a case, to the port of necessity of the nature of a general average? Are they not as much for the benefit of the *underwriters* as for the shipowner? * * * * * * And it seems to me, it would be an entire novelty, in case of insurance, not to hold that under such circumstances the underwriters were liable for the charges, as in the nature of general average."

In the case of *Dollar v. La Fonciere Compagnie* it was held that, if the taking of a damaged vessel to a port of necessity for repairs is for the benefit of both owner and insurer, the expense incurred in proceeding to that port constitutes a general average charge, to which both were bound to contribute, although there was no cargo liable to contribute. The District Court, referring to the case of *Potter v. Ocean Ins. Co.* (*ante,* p. 132), said:

"This case is authority for the propositions; First, That it is not essential to a general average charge that there was cargo upon the vessel liable to make contribution on account of the expenditure claimed as a general average charge; that, if only the owner and the insurer are benefited by the expense incurred in taking the injured vessel to a port of necessity for repairs, the latter, upon the principles of general average, is bound to contribute his proportionate share of such expense. Second, That, although a vessel may be in a port and in no immediate danger of loss, yet if she is unseaworthy, and it is necessary for her to seek another port for the purpose of necessary repairs, required in order to put her in a seaworthy con-

dition, the expense incurred by the vessel in going to the port of necessity constitutes a general average charge."

When a vessel, in ballast, meets with disaster and sustains damages or losses of a general average nature while proceeding to a loading port to enter upon a charter, there is no legal rule in the United States, nor practice, to make the chartered freight contribute.

CHAPTER XV

THE ADJUSTMENT—SECURITY FOR CONTRIBUTION

Vessel and cargo having arrived at their port of destination and the voyage terminated, the adjustment of a general average loss occurring on the voyage is usually made at that port, although not necessarily so, except that wherever it is drawn up it must, apart from a valid agreement to the contrary, be in accordance with the law, customs, and usages of the port of destination, and York-Antwerp Rules, when the latter are provided for in the contract of affreightment.

In case of *sacrifices* the adjustment is necessarily delayed until arrival of vessel or cargo at destination, contribution being dependent upon final saving of the vessel or a substantial part of the cargo, or of both.

Where the voyage is broken up at a port of refuge *and a severance of interests occurs there,* the adjustment, in the absence of agreement to the contrary, should be made in accordance with the law, customs, and usages at such port. (a)

> "Where a vessel is wrecked, or so damaged by peril of the sea that the voyage cannot be continued, and the master finds and substitutes another, whereby the cargo is carried to its destination, retaining his lien and earning freight, no separation of interests occurs until the destination is reached. Consequently the adjustment is to be made according to the rules prevailing there. Where the master forwards the cargo to its destination by another vessel in pursuance of his agency for its

(a) National Board of Marine Underwriters v. Melchers, Dist. Ct. Penn. 45 Fed. Rep. 643 (1891).

The *Eliza Lines,* Cir. Ct. Mass. 102 Fed. Rep. 184 (1900).

owners, alone, without intention to retain his lien and earn freight, the adjustment is to be made according to the rules of the place of reshipment. The intent in such case, however, may be and sometimes is involved in doubt by taking a bill of lading in the master's name, and consigning the goods to the ship's agent. Where the cargo is furnished by or on behalf of its owners, without retention of the ship's lien, the separation of interests occurs at the place of reshipment, and the adjustment must, consequently, be made according to the rules prevailing there." (*National Board of Marine Underwriters v. Melchers*)

A vessel which put into Bermuda, while on a voyage from Leghorn to New York, was condemned and sold there, and portions of the cargo were delivered to agents of the consignees in Bermuda, the underwriters on the cargo at New York signing an average bond whereby they agreed to pay their contribution "in accordance with established laws and usages in similar cases." The adjustment was made in New York according to New York rules, but the underwriters on the cargo contended that it was not made "in accordance with established laws and usages" in similar cases, but they did not aver that those in Bermuda in similar cases differed from those at New York, and the Court, in the absence of such averment, supported by proof, proceeded upon the presumption that they were similar and upheld the adjustment. (a)

A vessel, while on a voyage from Pensacola for Philadelphia, put into Bermuda in distress and was subsequently condemned and sold there, the cargo being reshipped to Philadelphia. To meet the expenses at Bermuda, which, with the freight, were liens on the cargo, the master borrowed money in exchange for which he gave a respondentia bond in which he agreed to hold the cargo until the bond was paid. The Court held that under the circumstances of the case it was proper that

(a) Olivari v. Thames & Mersey Marine Ins. Co., Dist. Ct. N. Y. 37 Fed. Rep. 894 (1888).

the adjustment of the general average should be made at Philadelphia, and not as if the cargo had been delivered to its owners at Bermuda. (a)

When a general average loss occurs in the case of a vessel with cargo on board for *successive* ports, and the laws and usages of one or more of them differ from those prevailing at the other ports, the practice, in the absence of a stipulation to the contrary, is to adjust such cases so that the laws and usages of each port of discharge shall regulate the adjustment as respects its own cargo.

Cargo discharged, for instance, at the first port, and before the general average loss occurs, is separated from the rest of the adventure, and not concerned in the further incidents of the voyage, but if such loss occurs *prior* to arrival at the first port and the cargo for that port is entitled to contribution for a sacrifice made for the common benefit, it is due and payable at the first port of separation, and should not be affected even by a subsequent total loss of the vessel and the remaining cargo for ports beyond (*post,* pp. 164-165). Generally speaking, it may be stated that, wherever the local Court would have power and jurisdiction to enforce the contribution, the law of that place would govern the rights of the parties.

In the cases of vessels meeting with disaster while bound from ports in the United States for those in the West Indies and Central and South America, where the laws and usages governing adjustments of general average are vague and uncertain, it is customary to adjust the general averages according to the customs and usages prevailing at the loading port of the vessel, and York-Antwerp rules, when provided for in the contract of affreightment, and to have the statements drawn up in the United States. This is found to give satisfaction on the whole to all parties interested, and owners of vessels

(a) Bradley v. Cargo of Lumber, Dist. Ct. Penn. 29 Fed. Rep. 649 (1886).

and shippers and underwriters on the cargoes (the majority of the latter being located usually in the United States) are able to supply documents and much of the information necessary for prompt adjustments.

York-Antwerp Rule No. 18 reads as follows:

> Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these Rules.

The shipowner, except when there is an agreement to the contrary in the charter-party, appoints the adjuster.

The services performed by average adjusters in the United States are not confined, as is the case with those in many other countries, to the preparation of the statement of the general average and the placing of it in the hands of the shipowner for collection and settlement with the various interested parties. The adjuster, after receiving advices from the shipowner of particulars of the accident, often attends to various matters preliminary to the drawing up of the statement, such as arranging for the despatch of salvage assistance, and drawing up agreements with salvors, underwriters, and others in special cases, his advice being sought in many instances upon matters relating to the common interest of vessel and cargo.

On their arrival at destination the adjuster obtains the information necessary to arrive at the amount of the cash deposit required from consignees of cargo for payment of the general average and other charges, he attends to the signing of the average bond—under which he often acts as trustee—procures written guarantees of underwriters for payment of the charges, appoints appraisers to examine and report upon cargo damaged in consequence of a general average sacrifice, and surveyors to value the vessel.

The adjuster, after conferring with the shipowner

and the cargo owners, or their underwriters, is frequently able to arrange favorable settlements of salvors' claims and avoid the necessity of legal proceedings.

Upon the completion of the statement of the general average, the preparation of which in some cases involves a vast amount of detail work, the adjuster places copies of it before the interested parties for collection of the amounts, and, when these are in hand, he effects the settlements with those who are creditors under it.

While an adjuster is presumed to have knowledge of the laws and customs governing all matters pertaining to averages, and to correctly apply them to the great variety of cases which may come before him, his judgment is not necessarily binding on the parties interested, and the facts are open to inquiry. (a) He has no judicial authority and his interpretation of the laws and customs may, in case of dispute, be referred to the Courts for decision. The action of an adjuster in making up an average statement pursuant to an average bond is not an award by an arbitrator or conclusive as such upon those who signed the bond. (b)

The usual services performed and expenses incurred by average adjusters are *maritime* in their nature and an express agreement in an average bond for such services and expenses is cognizable in admiralty. (c)

> "By the maritime law it is the duty of the master, as the representative of the interests of all, upon completion of the voyage, to cause an average adjustment to be made, and to hold the cargo until the amount payable by each contributor is paid, or secured by a proper average bond. If this duty is not performed, and the cargo is delivered to the various consignees without requiring payment of their shares, that constitutes a breach of a maritime obligation, for which an action necessarily lies in favor of the persons entitled to contribution

(a) The *Santa Anna Maria,* Dist. Ct. S. C. 49 Fed. Rep. 878 (1892).

(b) The *Alpin,* Dist. Ct. N. Y. 23 Fed. Rep. 815 (1884).

(c) Coast Wrecking Co. v. Phoenix Ins. Co., Cir. Ct. N. Y. 13 Fed. Rep. 127 (1882).

against the master, the ship, and her owners, to recover the amount of the average, which the latter were bound to enforce, but did not. The persons entitled to compensation might, indeed, pursue the cargo, or the several consignees, if they could trace them; but the master and owners of the vessel have no right to throw that burden upon those whose property has been sacrificed for the common good. Having improperly and negligently, as respects the libelant, delivered the cargo without exacting contribution, they must respond for the amount, and themselves bear whatever trouble or expense may attend a resort to the various consignees who still remain liable." (a)

An *owner* of cargo is liable at common law, on an implied promise, for general average contribution, and the shipowner has a maritime lien on the cargo for same (b), and it devolves upon him to see that before delivery of it proper security is obtained from the consignees. This lien, however, is dependent upon the possession of the cargo by the master or shipowner and is lost by its voluntary delivery to the consignee before security is obtained. In such a case, the consignee, unless he is the owner of the cargo, is not liable for the general average chargeable upon it, although the owner of such cargo continues liable.

"There is no doubt that the master, as agent of the shipowner and all others concerned, has a possessory lien on cargo for all general average sacrifices and expenses. The obligation of an average bond is an engagement by the consignee, on the condition of his immediately receiving the goods, to pay his proportion of the general average as soon as it shall be ascertained by an adjuster in the usual way." (c)

The master of a steamer, which sank in the Mississippi River, reshipped part of her cargo to destination

(a) Heye v. North German Lloyd, Dist. Ct. N. Y. 33 Fed. Rep. 60 (1887). See, also, the *Santa Anna,* Cir. Ct. of App. 154 Fed. Rep. 800 (1907).

(b) Dupont de Nemours & Co. v. Vance, U. S. Sup. Ct. 19 Howard 174 (1856).

Wellman v. Morse, Cir. Ct. of App. 76 Fed. Rep. 573 (1896).

(c) The *Water Witch's* Cargo, Dist. Ct. Mass. 29 Fed. Rep. 159 (1886).

on another vessel, consigned to agents of his own, with instructions not to deliver it to the original consignees except upon their signing a general average bond. Upon its arrival the underwriters obtained possession of it upon payment of freight, *without giving any average bond,* claiming that it was not a case of general average.

Proceedings in *equity* to recover a contribution in general average were instituted by the shipowner against the owners of the reshipped cargo, and the Court, having found that such cargo was liable for its proportionate share of the entire expense of saving the vessel and her cargo, gave judgment in his favor. (a)

In the case of *Wellman v. Morse* the Court said:

> "Although, according to strict law, the right to payment of general average does not, perhaps, always await a discharge of the cargo (Carv. Carr. by Sea, 426-428), yet no admiralty court would enforce payment prior to an opportunity for its inspection by its owners for the purpose of determining its contributory value. This, nevertheless, would not prevent the filing of a libel in season to make good the lien if it became necessary. So that, practically, a prior discharge of the cargo is, in any event, necessary to enable the owner of the vessel to collect the amount due for general average * * * * * * * * * Therefore the owners of the schooner were bound to discharge the cargo, even into the lighters of its owners, before they could enforce actual payment of either freight or general average. The law is anxious to protect and enforce the right of the owner of a vessel to his freight, and also that to the reimbursement of general average charges and other charges; but it has never subordinated to such matters the duty of the vessel to transport and discharge its cargo. No view of the law, as applicable to this case, excused the owners of the schooner from making prompt discharge of the cargo, if insisted on by its owners. Therefore it is apparent that, under the ordinary rules of law, the owner of a vessel cannot detain the cargo aboard for non-payment of freight, and by parity of reasoning for non-payment of general average, and thereupon charge demurrage arising from such detention * * * * * * * * * * * * * * * * * *

(a) Mitchell Transp. Co. v. Patterson, Cir. Ct. Tenn. 22 Fed. Rep. 49 (1884).

The almost universal practice is for the master, before delivering the goods, to take an average bond, and for the owners of the cargo to give such a bond. It is not necessary to enlarge on this *

Indeed, the theoretical remedy of a cash settlement is so impracticable that Lowndes states, in substance, that something else is imperative. He says, indeed, that some other reasonable arrangement therefor 'has to be come to.' The conditions are so urgent, and the practice of giving and accepting security is so universal, that an admiralty court would look with disfavor, so far as in its power to do so, on any owner, either of a vessel or cargo, who refused to conform to it." (a)

As to the general terms and conditions of an average bond or agreement, the Court, in the case of *Wellman v. Morse* (*supra*), referring to and approving the English case of *Huth v. Lamport* (Asp. Mar. Law Cas., Vol. 5, pp. 543 and 593), stated as follows:

"First, it was held that, inasmuch as the parties had waived their strict rights with reference to immediate payment, and each party had impliedly consented to conform to the usage by virtue of which an average bond was to be given and taken, the owner of the vessel was, in the eyes of the law, liable for refusing an average bond in a reasonable form, and insisting that it should contain unreasonable conditions. The Court also refused to justify the form of bond demanded, although it had been sanctioned by an extensive usage for a considerable number of years. The Court further pointed out wherein the bond required was unreasonable; but we need not dwell on this, except to observe that the court approved the old London form, which was conditioned in the simplest terms to pay the obligor's share of general average when called upon, and that the result of the case shows that anything which in substance demands more than this, or which would in any way prejudice the owner of the cargo in denying the entire liability, or in questioning the amount of it if the liability was established, or which would close any of the methods which the law gives for ascertaining and determining the existence or extent of liability, cannot receive the approval of the courts. On the other hand, it is evident, reciprocally, that the master, on surrendering his lien, is entitled to demand security of an effectual character, and of such nature as will leave open, in his behalf, all legal methods

(a) Wellman v. Morse, Cir. Ct. of App. 76 Fed. Rep. 573 (1896).

of determining any controversy which may arise, and of promptly enforcing whatever amount the result of such determination may show he is entitled to. While, on the one hand, he cannot foreclose any questions which the owner of the cargo is entitled to have determined, he, on the other, is not required to weaken his position substantially, or to surrender any methods of relief, or to delay it, except so far as the same may be unavoidable in view of the fact that he gives up his lien."

Where a bond, executed by consignees of cargo, recited that the vessel "in the due prosecution of her said voyage, encountered strong winds and a heavy sea, which caused the vessel to labor severely" the shipowner was held to be entitled to the presumption that she was seaworthy at the commencement of the voyage, until that presumption was overthrown by proof. (a)

The customary forms of bond now in use are qualified in that they do not contain positive recitals of the facts upon which the claim for general average is based, the recitals being that the particular facts are "represented" or "alleged" as such, and thus the executing of a bond in that form is not a conclusive admission of facts by shippers or consignees of cargo or even a positive agreement that a general average loss had occurred. If necessary, they would be permitted to dispute the represented or alleged facts and to throw on the shipowner the burden of proving them. The cargo owner cannot be forced by means of the wording of an average bond, or otherwise, to assent to any variance from the laws and usages appropriate to the case. When the evidence does not show satisfactorily that there was either ignorance or error on the part of the signers, sufficient to invalidate the general average bond, and when it shows that they have availed themselves of the bond to obtain their goods, they cannot evade its obligations. (b)

(a) Franklin Sugar Refining Co. v. Funch, Cir. Ct. of App. 73 Fed. Rep. 844 (1896).

(b) The *John M. Chambers,* Cir. Ct. St. Louis. 24 Fed. Rep. 383 (1884).

It is usual to have an average agreement, or average bond, signed by the consignees, but the mere signature of a consignee or owner of cargo to such a document does not in itself constitute "security" such as the shipowner is entitled to. In practice, security for payment, if the cargo is uninsured or not insured in the United States, is a cash deposit with the adjuster as trustee, or, in lieu of a deposit, a written guarantee of an underwriter, banker, or surety company to pay whatever general average, salvage, and/or special charges the cargo may be liable for. A shipowner cannot, as a matter of right, demand a cash deposit from a consignee or owner of cargo, but it is a custom of long standing for such deposits to be made, and is found to be a convenient method of giving security. Should the consignee or owner decline to make a cash deposit the shipowner would be obliged to accept such security as would be considered proper and reasonable by a Court of law.

Cash deposits paid to secure contribution to general average at once become trust funds, and should be deposited in bank or trust company as a special interest-bearing account and, such funds, being *security* only, should not be appropriated for average disbursements, although it would seem that they could properly be used, in part or in whole, by the trustees, to satisfy claims by third parties for salvage or special charges against the particular cargo on which deposits are collected. In their dealings with these funds the trustees are subject to the laws relating thereto, and, whence once received by them, the money should not, without the consent of all parties interested, be exchanged for other form of security: the funds should be held intact by the trustee until completion of the adjustment, when the balances, if any, are to be paid to the legal holders of the receipts, plus such interest as the deposits have earned. If a deposit proves insufficient to meet the charges, the bal-

ance is payable by the signer of the average bond, in accordance with the terms and conditions thereof. If deposits collected, or proceeds of cargo that may come into the hands of the shipowner or his agents temporarily, are not placed in a special interest-bearing account, but are merged with his own funds, he is liable for the *legal* rate (a) of interest on such deposits and proceeds, and not merely for the lower rate which they would have earned if they had been placed in a special account.

It was held that proceeds of cargo received by a shipowner abroad and subsequently remitted to the cargo owner in the United States must be accounted for by the former at the rate of exchange current on the day he received the money, and not at the rate current on the day it was paid over to the cargo owner. (b)

While the shipowner has a maritime lien on the cargo for general average expenses, and is entitled to security before it is delivered, he, on the other hand, must, if required, furnish security to the cargo if it is expected that it will be a creditor in final adjustment, and not a debtor.

In 1896, by Act of Congress, Section 2981 of the Revised Statutes of the United States was amended to enable a lien for contribution in general average to be filed with the collector, or other officer, of the customs upon any cargo in his custody, and to provide that delivery of such cargo shall be refused until the contribution is paid or secured.

Payments voluntarily made to the vessel by consignees or owners of cargo, or by their underwriters, with knowledge of the facts, and not in consequence of fraud, misrepresentation, or mistake, nor under any duress, are binding, and cannot be recovered back upon grounds which would have constituted a defence, of which the

(a) For legal rates of interest in different States, see App., p. 178.

(b) The *Weatherby*, Dist. Ct. Penn. 48 Fed. Rep. 734 (1891).

material facts were known at the time of payment. (a) The two cases cited below involved the question of *negligent navigation* only, but if, after a voluntary payment to the shipowner, its recovery back was sought because of *unseaworthiness* of vessel, the material facts in connection with which were not at the time of such payment known to those who made it, their right, if any, of recovery might depend somewhat on the opportunity which they had of investigating and ascertaining the facts regarding the unseaworthiness before making the payment and the interval which elapsed between the date of the request for the payment and the date of such payment, during which period the consignees or owners of the cargo, or their underwriters, might have had opportunity of determining whether to resist the claim. If, however, the voluntary payment was made by consignees or owners of cargo, not to the shipowner, but direct to third parties, such as salvors, to extinguish their lien on the cargo, such payment could be recovered from the shipowner if unseaworthiness of the vessel was the cause of the disaster. (b)

(a) The *Nicanor,* Cir. Ct. N. Y. 44 Fed. Rep. 504 (1890).
The *Agathe,* Dist. Ct. Ala. 71 Fed. Rep. 528 (1895).

(b) British & Foreign Marine Ins. Co. v. Kilgour S. S. Co., Dist. Ct. N. Y. 184 Fed. Rep. 174 (1910).

CHAPTER XVI

ALLOWANCES

When allowances are made in general average for damage to vessel, *one-third* is deducted from the cost of all repairs, irrespective of her age, or whether she is built of steel, iron, or wood, including labor and material, towage, and pilotage to and from dry dock, dry dock dues, etc. This is an old-established custom and prevails not only in the United States, but among most of the maritime nations, for the reason that to allow the cost of repairs in full would benefit the shipowner by giving him new material for old, and to that extent, in theory at least, put the vessel in better condition than she was in before the disaster.

The exceptions to this rule are ropes, stores, or other materials sacrificed when *brand new,* in which case no deduction is made from the cost of replacing them. Anchors are also allowed for without deduction of "new for old," unless wood-stocked, in which case the stock is subject to deduction. In practice, no deduction is made from the cost of straightening bent ironwork, fairing plates, opening up and cleaning machinery, *or where there is no betterment involved. Temporary* repairs which are of no lasting benefit to the shipowner are not subject to any deduction, and this is specially provided for in York-Antwerp Rule No. 14, viz.:

> No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

The general rule under which the deduction of one-third, new for old, is made from the cost of repairs or

renewals, whether in general or particular average, was founded in the days when commerce on the high seas was carried on in sailing vessels built of *wood,* and was intended to provide for the depreciation sustained from ordinary wear and use of the parts of such vessels or their equipment lost or damaged. While the rule in its application did not, in all cases, result in the proper measure of indemnity, it was considered that in the long run it worked out substantial indemnity, and its value as a practical rule applicable to questions of value, on which, in many, if not most, cases, there might be room for doubt or difference of opinion, was generally admitted.

The wooden sailing vessel has now, however, to a great extent been replaced by vessels built of iron or steel, on which, as is well known, the rate of depreciation from wear and use is much less than with the wooden built vessel, and it is quite evident that the application of the rule to the cases of iron or steel vessels does not give indemnity to the shipowner.

Provision is made in the York-Antwerp Rules for deduction, on a graduated scale, based on the age of the vessel, for depreciation from wear and use, but in the United States the old rule of deducting one-third in all cases still obtains, and it is evident that some modification is necessary as to iron or steel vessels, in the early life of which the depreciation, particularly as regards the iron or steel work of hull, is practically nil.

At this writing the matter is under consideration by the Association of Average Adjusters of the United States and it is hoped that the equities of the question may be met by the adoption of a rule of practice by the Association, to be submitted, if found necessary, to a ruling of the Court on a test case to be brought for that purpose.

When a constructive total loss of a vessel occurs through general average and particular average damage

combined, the allowance to be made in general average is arrived at by taking the estimates of the cost of repairing both classes of damage and apportioning upon them the sound value of the vessel before the disaster (less her net proceeds), *without* deduction of "new for old."

If, after arrival of vessel and cargo at destination, repairs to the vessel as the result of damage by a general average act are, for any reason, to be deferred, and the vessel is lost before they are made, the right of the shipowner to recover contribution from the cargo toward the damage so sustained is not affected thereby, notwithstanding that, so far as this damage is concerned, he has not suffered an actual out-of-pocket expense. Such voluntary damage having been the means, in whole or in part, as the case may be, of enabling the vessel and cargo to reach their destination, the loss of either by a subsequent disaster after the voyage is ended and the cargo delivered does not change their respective rights which existed at the time of their arrival. The allowance, however, is based on the estimated cost of repairing only such damages of a general average nature as had been ascertained and does not extend to others which, although supposed to have been sustained, cannot be estimated with any degree of accuracy.

To establish the right to claim for contribution toward sacrifices of vessel it is not necessary, after the voyage is completed or after the vessel and cargo part company, that the sacrifices be actually repaired or replaced. *The fact that there was such voluntary damage* is in itself sufficient to entitle the shipowner to contribution, based, if necessary, on *estimates* of the cost of repairs or replacements. Otherwise, in the case, for instance, of sacrifices for the common benefit of vessel and cargo whereby the vessel is found to be so badly damaged as to be rendered incapable of being repaired and a constructive total loss, her owner would be burdened with

the whole of a loss resulting from a sacrifice which was beneficial to the cargo as well as to her. (a)

When York-Antwerp Rules are provided for in the contract of affreightment, the deductions in respect of "new for old" are made according to the scale provided for in Rule 13, which may be summarized as follows:

ALLOWANCES
IRON OR STEEL VESSELS

Deductions from Date of Original Register to the Date of Accident

	Up to 1 Year Old	Between 1 and 3 Years	Between 3 and 6 Years	Between 6 and 10 Years	Between 10 and 15 Years	Over 15 Years
Woodwork of hull	none	1/3	1/3	1/3	1/3	1/3
Woodwork of masts and spars	"	"	"	"	"	"
Furniture	"	"	"	"	"	"
Upholstery	"	"	"	"	"	"
Crockery	"	"	"	"	"	"
Metal and glassware	"	"	"	"	"	"
Sails	"	"	"	"	"	"
Rigging (other than wire)	"	"	"	"	"	"
Ropes, sheets and hawsers (other than wire and chain)	"	"	"	"	"	"
Awnings and covers	"	"	"	"	"	"
(a) Painting or coating of bottom	1/3	"	"	"	"	"
Painting	none	"	"	"	"	"
Cementing	"	none	none	none	1/6	"
Wire rigging	"	1/6	1/6	1/3	1/3	"
Wire ropes and wire hawsers	"	"	"	"	"	"
Chain cables	"	"	"	1/6	1/6	1/6
Chains	"	"	"	"	1/3	1/3
Donkey engines	"	"	"	1/3	"	"
Steam winches and connections	"	"	"	"	"	"
Steam cranes and connections	"	"	"	"	"	"
Ironwork of hull	"	none	none	none	1/6	"
Ironwork of masts and spars	"	"	1/6	1/3	1/3	"
(b) Machinery (inclusive of boilers and their mountings)	"	"	"	"	"	"
Straightening bent ironwork, including labor of taking out and replacing it	"	"	none	none	none	none
Dock dues, expenses of removals, cartages, use of shears, stages and graving dock materials	"	"	"	"	"	"
Anchors	"	"	"	"	"	"
(c) Provisions and stores which had not been in use	"	"	"	"	"	"
Old material repaired without being replaced by new	"	"	"	"	"	"

(a) No painting of bottom to be allowed if it has not been painted within six months previous to the date of the accident.

(b) Deduction to be regulated by the age of the machinery and boilers, and not by the age of the vessel.

(c) Deductions to be regulated by the age of the provisions and stores, and not by the age of the vessel.

Note: The same deductions as apply to *Machinery* are, in practice, made from repairs to or renewals of feed pumps, bilge pumps, sanitary pumps and all independent pumps not controlled by the main engines, air pumps, circulating pumps, windlass, steering engine, electric dynamo and refrigerating and other auxiliary machinery.

(a) Potter v. Providence & Washington Ins. Co., Cir. Ct. 4 Mason Rep. 298 (1826).

WOODEN OR COMPOSITE VESSELS

When the vessel is under one year old from date of original register, at the time of the accident, no deduction "new for old" is made. After that period the rule is as follows:

Anchors	No deduction.
Chain cables	A deduction of one-sixth.
Provisions and stores which had not been in use	No deduction.
Metal sheathing	The cost of a weight equal to the gross weight of metal sheating stripped off allowed in full less the proceeds of the old metal.
Nails, felt, and labor metalling	A deduction of one-third.
Straightening bent ironwork, including labor of taking out and replacing it	No deduction.
Dock dues, expenses of removals, cartages, use of shears, stages and graving dock materials	No deduction.
All other repairs	A deduction of one-third.

Allowance for damage to cargo is the amount of damage which it has suffered by the general average act, based on the market value at port of destination (or at the end of the voyage if terminated elsewhere) existing on discharge of the cargo. In a case where cargo is jettisoned the allowance is the net market value which could have been realized for it if, instead of being jettisoned, it had arrived with the vessel and the remainder of the cargo (*ante,* pp. 55-56). As regards the general method of ascertaining the measure of damage to cargo the cases cited below (claims against carriers) will be found of interest. (a)

A sacrifice of cargo usually carries with it a loss of freight, and such freight is also to be contributed for; if the freight has been absolutely prepaid, the cargo owner receives the allowance for it in the enhanced value of the goods, but if it was at the risk of the shipowner the allowance is for his benefit. In the latter case the net freight only is allowed, arrived at by deducting from the gross amount the expenses which would have been

(a) The *Mangalore,* Dist. Ct. Calif. 23 Fed. Rep. 463 (1883).
The *Rossend Castle,* Dist. Ct. N. Y. 30 Fed. Rep. 462 (1887).
The *Boskenna Bay,* Dist. Ct. N. Y. 31 Fed. Rep. 612 (1887).
Morrison v. I. & V. Florio S. S. Co., Dist. Ct. N. J. 36 Fed. Rep. 569 (1888).
The *Guiding Star,* Cir. Ct. Ohio. 37 Fed. Rep. 641 (1889).
The *Earnwood,* Dist. Ct. Penn. 83 Fed. Rep. 315 (1897).
United S. S. Co. v. Haskins, Cir. Ct. of App. 181 Fed. Rep. 962 (1910).

incurred to earn it, as, for instance, the cost saved of discharging cargo that was jettisoned, wharfage, watching, the saving, if any, in pilotage dues on account of lessened draft of the vessel by reason of a jettison, etc.

Rules Nos. 15 and 16 of the York-Antwerp Rules read:

Rule 15

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Rule 16

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

In the event of a general average sacrifice, whether of a part of the vessel or of cargo, and a subsequent independent accident occurs, the value of the property which existed at the time of the sacrifice is not necessarily allowed for, but only that which ultimately was lost to the owner by the sacrifice. If it can be clearly shown that, had the voluntary sacrifice not been made, the loss or damage would later during the voyage have been accidentally incurred, it cannot be said that the owner lost anything by the sacrifice.

A shipowner or other party making an advance of funds for general average purposes is entitled to the customary allowance of two and one-half per cent. for doing so. If proceeds of cargo or deposits collected are used to make disbursements, a similar allowance, to the extent that those funds were used, should be credited to the proceeds or deposits.

Interest at the legal rate (a) is allowed on general average disbursements and on allowances from dates of

(a) For legal rates of interest in different States, see App., p. 178.

payment or loss until a reasonable time after the completion of the adjustment, usually to a date when the cargo owner or his underwriter should have had ample time to examine it and to pay his proportion.

A collecting and settling commission of two and one-half per cent. on the general average disbursements and on allowances to vessel and cargo is allowed as part of the general average (a), as compensation to the party who collects and settles the amounts due under the adjustment.

In San Francisco, Portland, Ore., Seattle, and Tacoma, the customary allowance for commission for advancing funds is five per cent. and for collecting and settling five per cent. on the first $10,000, two and one-half per cent. on the next $20,000, and one per cent on the remainder.

(a) Barnard v. Adams, U. S. Sup. Ct. 10 Howard 270 (1850).
Sturgess v. Cary, U. S. Sup. Ct. 2 Curtis 59 (1854).

CHAPTER XVII

CONTRIBUTORY VALUES

The property benefited by a general average loss contributes, as a general rule, upon its net saved value, to which must be added, for the purpose of *equalization,* the amounts, if any, made good in the general average. If the amounts made good did not contribute, the owner of the property sacrificed and allowed for in the general average would be better off than those whose property was not sacrificed, contrary to the well-established doctrine that no interest shall benefit at the expense of the others.

Contribution to *sacrifices not replaced during the voyage* is contingent upon the saving of vessel or of a part of the cargo, or of both, and is based upon the values at the end of the voyage. This rule in regard to the right to contribution is not applicable to *expenditures,* which should be repayable irrespective of arrival, and upon the values which existed at the time they were incurred (*ante,* pp. 11-14). In a case involving both sacrifices and expenditures the saved values at destination are, in practice, taken as the contributory values, but if vessel or cargo, or both, sustain extensive loss or damage during the voyage *after* the expenditures have been incurred, on principle two apportionments should be made: one in respect of expenditures based upon the values which existed at the time they were incurred, and another in respect of sacrifices based upon the saved values at destination.

VESSEL

The contributory value of the vessel should be based upon her value in the condition in which she arrives *at the port where the voyage is terminated,* where the contribution becomes due, as her value at that port, less the cost of any repairs made subsequent to the general average act and prior to arrival, represents what has been saved to the shipowner by such act.

The ascertaining of the proper values of vessels for contribution to general average is frequently attended with difficulty and perplexing problems owing to the ever varying conditions of their age, build, and type, and the systems employed by surveyors and others in arriving at their values differ.

Some commence with the original cost—or, if this is unknown, the estimated cost—and then reduce this by deducting certain percentages for supposed annual depreciation, but this method is unsatisfactory, as the deductions based on an estimated annual depreciation would, if carried out according to age, in some instances so reduce the value that there would be practically nothing left. Much must depend upon the upkeep and general condition of the vessel, and this, by comparison, may exhibit a marked difference in vessels of the same age, build, and type. One shipowner may keep his vessel in good general condition and repair while another may not do so. Others arrive at the value by the sale prices of similar vessels which may within a recent period have been disposed of by their owners and making such alterations in respect of the value sought as the difference, if any, in the comparison may warrant.

It would seem, however, that some method other than those described is desirable, and perhaps a better guide to the saved value of a vessel would be found in first ascertaining what it would cost to build one of the same type and then deducting from this a reasonable amount

for wear and tear, dependent upon the age of the vessel and the condition in which she has been kept up.

There is, however, no general rule which will meet all cases, and even more difficulty is encountered in determining the values here of vessels of foreign nationalities than of those owned and registered in the United States. According to law, vessels, except as noted below (a), must be built in and be owned by citizens of the United States and be commanded by a citizen of the United States to be deemed vessels of the United States and entitled to official registry as such, and, hence, there being no market for the sale of foreign vessels except to a foreigner, the values of such vessels to their owners are approximately the same at a United States port as at a home port.

York-Antwerp Rule No. 17 reads as follows:

> The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.
>
> Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

(a) Under the Panama Canal Act, passed by Congress in 1912, *foreign built* vessels which are not more than five years old at the time application is made for registry are eligible under the Act for *registry under the American flag*, provided they are to engage only in trade with foreign countries or with the Philippine Islands and the islands of Guam and Tutuila. They must, however, be "wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the president and managing directors of which shall be citizens of the United States, and no others."

It will be seen that, according to the language of this Rule, if repairs of a general average nature are made to a vessel prior to her arrival at destination, the amount made good for same, although to be added to her actual value at the termination of the adventure, is not to be deducted from such value in arriving at her contributory value. The Rule states that the contribution shall be made upon the actual value of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, *except such charges as are allowed in general average.*

To apply the strict wording of this Rule would lead to an unsound result and be contrary to well recognized principles of adjustment and equity, and, in practice, the cost of repairs, whether of a general or particular average nature, made prior to arrival of the adventure at destination is deducted from the vessel's arrived value, and the amount made good in general average is then added to arrive at her proper contributory value.

FREIGHT

The basis for ascertaining the amount of freight to contribute is found in the freight named in the bill of lading, and it matters not, in the case of a chartered vessel, whether the charter hire for the voyage exceeds or is less than the bill of lading freight. When it is at the risk of the vessel it contributes on the amount at her risk, *less* one-third or one-half, according to the rule applying in ports in the several States in this country, such deduction being fixed by custom *for convenience* and representing, *in theory,* the expenses incurred by the vessel to earn the freight after the general average act or sacrifice, and this deduction is made regardless of the stage of the voyage at which the act or sacrifice occurred.

From the remaining two-thirds or one-half any special charges are to be deducted and any amount made good in general average is to be added to arrive at its contributory value.

The deductions in the several States are as follows:

Alabama	one-half	New Hampshire	one-third
California	"	New York	one-half
Connecticut	one-third	North Carolina	"
Delaware	"	Ohio	"
Florida	one-half	Oregon	"
Georgia	"	Pennsylvania	one-third
Illinois	"	Rhode Island	"
Louisiana	one-third	South Carolina	"
Maine	"	Texas	one-half
Maryland	"	Virginia	"
Massachusetts	"	Washington	"
Michigan	one-half	Wisconsin	"

On principle, the freight should contribute on the net amount saved to the vessel by the general average act or sacrifice, and to arrive at this amount there should be deducted from the gross amount at risk the actual expenses, i. e., crew's wages, port charges, etc., incurred to earn it subsequently to the act or sacrifice. This is the basis provided for in the York-Antwerp Rules, and, as the actual expenses can be accurately ascertained, there appears to be reason why the old custom of deducting one-third or one-half should be changed. The matter is now under consideration by the Association of Average Adjusters of the United States and it is to be hoped that a rule of practice will be adopted to meet the equities of the question.

If the freight has been prepaid and by stipulation in the bill of lading is not to be returned even should the vessel or cargo be lost or not, it is not at the risk of the vessel, and its share of the contribution is payable by the cargo (*post*, p. 162). If it has only been prepaid or advanced, but without the right of the vessel to

retain it absolutely, it remains at the risk of the vessel and its share of the contribution is payable by her.

If, as is frequently the case with cargoes of sugar, coal, coke, etc., freight is to be paid by the shipper or consignee of the cargo at a stipulated rate per ton *on the quantity intaken* upon right delivery of cargo, and during the voyage a portion of the cargo is jettisoned for the common benefit, the value of the jettisoned cargo, without any deduction of freight, is allowed in general average, contribution on the entire freight being payable by the vessel, the cargo contributing on its value less the freight. (a)

When a vessel is under charter it is customary to state separately in the general average adjustment, for convenience in settlement, the contribution payable by the freight at the shipowner's risk and that payable by the freight at the charterer's risk. Such separation, however, does not affect the liability of vessel or cargo in any respect, and it is always to be remembered that the basis for ascertaining the total amount to contribute is found in the freight payable by the cargo. If, in the case of a chartered vessel, the entire freight is prepaid and at the risk of the cargo, neither the charterer nor shipowner would be called upon to contribute on freight, irrespective of whether the charter hire was in excess of or less than the bill of lading freight. General average recognizes only the vessel, the cargo, and the freight named in the bill of lading, and is not concerned with the contractual relations between shipowner and charterer.

When a vessel is under *time* charter, and the shipowner and charterer each pay part of the expenses of the voyage, the contributing values are:

(a) *Shipowner's* Freight—Amount of hire from date it recommences after the general average act or sacrifice until date

(a) Christie v. Davis Coal and Coke Co., Cir. Ct. of App. 110 Fed. Rep. 1006 (1901).

of completion of discharge of cargo at port of destination, *less* one-third or one-half, according to rule at such port.

(b) *Charterer's* Freight—Amount of freight due by cargo at port of destination according to bills of lading, *less* hire of vessel, as above, and *less* one-third or one-half, according to rule at such port, of the bill of lading freight.

When the shipowner pays the entire cost of operating the vessel, including the port charges, etc., at destination and the cost of discharging the cargo, as is usual with a *voyage* charter, the same deduction as referred to above in paragraph (a) applies to the freight at his risk; the charterer's freight, however, is subject only to a deduction of the hire, and not of one-third or one-half in addition.

When the York-Antwerp Rules are applicable to a *time* charter, and the shipowner and charterer each pay part of the expenses of the voyage in accordance with the usual charter-party terms, the contributing values are:

(a) *Shipowner's* Freight—Amount of hire from date it recommences after the general average act or sacrifice until date of completion of discharge of cargo at destination, *less* wages of master, officers, and crew which would not have been incurred had the vessel and cargo been totally lost at the date of the general average act or sacrifice and have not been allowed in general average.

(b) *Charterer's* Freight—Amount of freight due by cargo at destination according to bills of lading, *less* hire of vessel, as above, and *less* such contingent expenses (port charges, cost of discharging cargo, etc., etc.) as would not have been incurred had the vessel and cargo been totally lost at the date of the general average act or sacrifice.

When the shipowner pays the entire cost of operating the vessel, including the port charges, etc., at destination and the cost of discharging the cargo, as is usual with a *voyage* charter, the deduction, under York-Antwerp Rules, from the freight at his risk is for the wages and other contingent expenses, the charterer's freight being subject to a deduction only of the hire.

In the case of a *sub*-charter a further separation is sometimes made as between the charterer and the sub-charterer. The latter contributes on the amount of freight due by the cargo at destination, less the charter hire paid by him to the charterer and the port charges, etc. The charterer contributes on the excess, if any, between the amount of the charter hire paid by him to the shipowner from the date of the general average act or sacrifice and the amount of the sub-charter hire for the same period.

If a charter party provides for an advance of freight by the charterer at a loading port to enable the master to make ordinary disbursements, and there is the customary provision that it shall be subject to a deduction of an amount to cover the cost of *insurance,* such advance, when made, is regarded as prepaid freight, without the right of the charterer to recover it back in case of the loss of vessel or cargo. Therefore, being at his risk, the contribution thereon is payable by him and not by the shipowner.

The York-Antwerp Rules, in the matter of the contributory value of freight, provide for a deduction from the gross amount of the crew's wages and port charges, incurred *subsequently* to the general average act or sacrifice, and have not been allowed in general average. In practice, the cost of fuel purchased, canal charges, and consumable stores and provisions purchased are also deducted provided such expenses are incurred and the stores and provisions are consumed subsequent to the general average act and before the termination of the voyage, being considered as covered by the words in Rule No. 17: "all charges incurred in respect thereof."

CARGO

Cargo contributes on its wholesale selling value on discharge at the port of destination, in the condition landed, less freight, duty, cartage to store, brokerage,

and other landing charges contingent upon arrival, but not merchant's commission nor insurance premium; no deduction of freight is to be made if it is absolutely prepaid on terms precluding its recovery in event of loss of vessel or cargo, or both, such freight being then merged in the value of the cargo and at the risk of the owner of the cargo and not at that of the shipowner. (a) From the net landed value special charges on the cargo, if any, are to be deducted, and any amount allowed in general average for loss or damage is then to be added to arrive at its contributory value.

Sales "to arrive," being speculative and contracts between third parties, are not allowed to affect the contributory values, whether higher or lower than the market values at the time of the actual arrival of the goods.

In determining the contributory values of cargoes in cases of vessels *outward* bound it is customary, when the adjustment is drawn up in the United States, to use the invoice cost with addition of ten per cent., plus shipping charges and prepaid freight, as representing approximately the net market values at destination. This method of procedure is adopted, in practice, as a matter of expediency, to avoid the expense and delay that would be necessary, particularly with cargoes for the West Indies and Central and South American ports, to ascertain the actual values at destination. In many cases it is practically impossible to procure such market values, and information regarding duties, etc., especially where there are a number of consignees, and the method referred to has been found to be satisfactory to all interests. In the case of goods not exported for profit no addition to the invoice value is made.

The general rule that the contributory value is to be based upon the arrived value of the property at destination, less cost of all repairs and renewals subsequent

(a) British & Foreign Marine Ins. Co. Ltd. v. Maldonado & Co., Cir. Ct. of App. 182 Fed. Rep. 744 (1910).

to the general average act, and before arrival, which rule, except in special cases, is adhered to in practice (*ante,* p. 154) when *one* general average only is involved, is not always applicable when *separate* general averages occur during a voyage, *if the relative values of vessel and cargo are changed.* Take, for instance, the case of a vessel with cargo for one port only, being obliged, for the common benefit, to put into two ports of refuge. At the first port she may have to undergo extensive repairs and may then, on leaving that port, be in practically sound condition again. At the second port she may require little or no repair, although the general average expenses there may be very heavy notwithstanding. It will be seen that there is thus a material change in the value of the vessel between the first and second general average acts, and to adjust the case as *one* general average, whereby she is made to contribute to the expenditures at the *second* port on her arrived value at destination, less the cost of *all* repairs and renewals at both ports of refuge, would be manifestly unjust to the cargo. The outlay for repairs or renewals at the first port gave to the vessel an added value when leaving there, and, that added value being saved to her owner by the second general average act, it is difficult to see why it should not contribute to the expenses occasioned thereby.

On the other hand, part of the cargo may, on account of damage received, be discharged and sold at the first port of refuge, in which event the proceeds could not be called upon to contribute to the second general average. Or, supposing that the cargo sustained accidental damage after leaving the first port of refuge so that on arrival at destination its value was practically nil, can it be seriously contended that the vessel in such a case should bear the whole of the expenditures?

On principle, therefore, it is submitted that cases of this kind should be adjusted as two separate general

averages with two apportionments, the contributory values being based upon those saved by the separate general average acts.

The second general average should be first apportioned, and upon the following basis: After the saved values have been ascertained (viz.: arrived values less cost of permanent repairs or replacements, if any, made before arrival but subsequent to the second general average *act*) any amounts made good to vessel, freight, or cargo in that average should be added, and also any amounts made good in the first general average for sacrifices, if any, *not replaced during the voyage,* contribution to the last-mentioned being contingent upon arrival. The contribution to the second general average payable by vessel, freight, and cargo, respectively, having been ascertained, the first general average should then be apportioned as follows: After the saved values have been ascertained (viz.: arrived values less cost of permanent repairs or replacements, if any, made before arrival but subsequent to the first and prior to the second general average *act*) any amounts made good to vessel, freight, or cargo in that average should be added, and deduction should then be made, in respect of vessel, freight, and cargo, of their contributions to the second general average, in order to arrive at *the final saved values.*

In a case of two separate general averages involving in each *sacrifices only,* and which are not repaired or replaced during the voyage, two apportionments are unnecessary, notwithstanding any relative change in the values of vessel and cargo, contribution to the entire loss being contingent upon arrival and therefore to be based upon the values at the end of the voyage.

When a vessel, with cargo for *two* ports, incurs two general averages, one before reaching the first port and the other subsequent to discharge of the cargo for that port, the cargo for the first port, not being concerned with the further portion of the voyage, has the

right to have its contribution, both as to sacrifices and expenditures, determined at that port (*ante,* p. 137), and, after the saved values there have been ascertained (viz.: arrived values less cost of permanent repairs or replacements, if any, made before arrival but subsequent to the first and prior to the second general average *act*), any amounts made good to vessel and to cargo for both ports in the first general average should be added to find the contributory values. This apportionment, while applicable to vessel and to cargo for the second port in respect of *expenditures* and to amounts made good for sacrifices of cargo destined for the first port, is not necessarily conclusive between them as to amounts made good for *sacrifices* of vessel and of cargo for the second port *not replaced* before arrival or while at the first port, contribution to such sacrifices being contingent upon arrival at the second port.

In the apportionment of the second general average, after the saved values have been ascertained at the second port (viz.: arrived values less cost of permanent repairs or replacements, if any, made before arrival but subsequent to the second general average *act*), any amounts made good to vessel and to cargo in the second general average should be added, and also any amounts made good to them in the first general average for sacrifices *not replaced* before arrival at the second port, contribution to the last mentioned being contingent upon arrival at the second port, accomplished by the incurring of the second general average. Deduction should then be made, in respect of vessel, freight, and cargo, of their contributions to *expenditures* incurred prior to arrival and while at the first port, and to amounts made good for sacrifices of cargo for the first port, these contributions, if not actually paid or secured before the voyage is resumed, being considered as due and payable irrespective of the subsequent fate of vessel and cargo for the second port, and deducted in order to arrive at the

final saved values. If the amounts made good in the first general average for sacrifices not replaced during the voyage were not made to contribute to the second general average, the owner of the property so sacrificed would fare better than those whose property remained intact, contrary to the rule that contribution is so regulated as to make it immaterial whose property is sacrificed for the common benefit.

The practice in the United States is to exclude passengers' baggage and personal effects from contribution to general average, even when stowed in baggage compartment, but if they are stowed there and are damaged by a general average act, the loss is a subject of contribution. (a)

> "Where, as in this country, there is no statutory provision on the subject, and no adjudication, the omission of the baggage from assessment, beyond that actually in possession of the passenger, and in use on the voyage, must be regarded as a favor or courtesy to passengers, or as being a waiver for practical reasons, rather than a strict legal right to exemption under the general maritime law; unless, indeed, the practice not to detain and hold baggage for a general average adjustment were proved to have been so long settled and acted upon as to form one of the implied terms and conditions upon which passengers embark. Though such a practice, if established and well understood, might possibly entitle the passenger, in cases of a general average loss, to a delivery of his baggage without detention, it would not relieve him from the obligation to contribute by a *pro rata* deduction, according to the usual rule in general average, upon the amount allowed to him for his particular loss, when the passenger himself is seeking compensation; because in that situation none of the practical reasons for omitting passengers' baggage from assessment are applicable." (b)

Clothes and personal effects of the master, officers, or crew which are sacrificed for the common benefit are allowed for in general average, although they are not

(a) Heye v. North German Lloyd, Cir. Ct. 36 Fed. Rep. 705 (1888).

(b) Heye v. North German Lloyd, Dist. Ct. N. Y. 33 Fed. Rep. 60 (1887).

called on to contribute, the following being a statement of the law on this point:

> "On the other hand, the clothes of seamen, munitions of war, and, usually, provisions of the ship for use on board, do not contribute; though they are paid for if sacrificed. The reason assigned for excepting seamen's clothes is not only the favor accorded to seamen by the modern law from their necessitous condition, and in order that they may not hesitate in sacrificing what is necessary through any fear of personal loss, but on account of their necessary exertion in connection with the special peril. * * * By the provisions of all the maritime codes, the clothes and baggage of passengers, like the clothing of sailors, munitions of war, and provisions for the ship, though not called on to contribute, must, as I have said, be paid for if sacrificed for the common good." (a)

It sometimes happens that the master, officers, or crew ruin the clothes which they are wearing when engaged in extinguishing a fire on board their vessel, or in other extraordinary efforts to avoid the loss of vessel and cargo, and while this cannot be deemed a "sacrifice" for the common benefit, the loss sustained by them is, in practice, allowed in general average for consideration of the owners of and underwriters on vessel and cargo and is usually paid without demur.

The York-Antwerp Rules provide that passengers' luggage and personal effects, not shipped under bill of lading, shall not *contribute to* general average, but this does not preclude a claim for *contribution in* general average, the Rule merely allowing the shipowner, as between him and the cargo, to eliminate the passengers as contributors owing to the difficulty which would be involved in obtaining security from them and the impracticability of ascertaining correct values.

Passage-money does not, in practice, contribute to general average, and wages of master, officers, and crew and the mails are exempted from contributing.

(a) Heye v. North German Lloyd, Dist. Ct. N. Y. 33 Fed. Rep. 60 (1887).

APPENDIX

YORK-ANTWERP RULES, 1890

RULE I—JETTISON OF DECK CARGO

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

RULE II—DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

RULE III—EXTINGUISHING FIRE ON SHIPBOARD

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

RULE IV—CUTTING AWAY WRECK

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

RULE V—VOLUNTARY STRANDING

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo,

and freight, or any of them by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety the consequent loss or damage shall be allowed as general average.

RULE VI—CARRYING PRESS OF SAIL—DAMAGE TO OR LOSS OF SAILS

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

RULE VII—DAMAGE TO ENGINES IN REFLOATING A SHIP

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

RULE VIII—EXPENSES LIGHTENING A SHIP WHEN ASHORE, AND CONSEQUENT DAMAGE

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

RULE IX—CARGO, SHIP'S MATERIALS, AND STORES BURNT FOR FUEL

Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

RULE X—EXPENSES AT PORT OF REFUGE, ETC.

(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place

shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(b) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(d) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

RULE XI—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, ETC.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X, the wages payable to the Master, Officers, and Crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the Master, Officers, and Crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

RULE XII—DAMAGE TO CARGO IN DISCHARGING, ETC.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

RULE XIII—DEDUCTIONS FROM COST OF REPAIRS

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.:

In the case of IRON or STEEL ships, from date of original register to the date of accident,

Up to 1 year old. (a)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 3 Years. (b)	One-third to be deducted off repairs to and renewal of Woodwork of Hull, Masts and Spars, Furniture, Upholstery, Crockery, Metal and Glassware, also Sails, Rigging, Ropes, Sheets, and Hawsers (other than wire and chain), Awnings, Covers and painting. One-sixth to be deducted off Wire Rigging, Wire Ropes and Wire Hawsers, Chain Cables and Chains, Donkey Engines, Steam Winches and connections, Steam Cranes and connections; other repairs in full.
Between 3 and 6 Years. (c)	Deductions as above under Clause b, except that one-sixth be deducted off Ironwork of Masts and Spars, and Machinery (inclusive of boilers and their mountings).
Between 6 and 10 Years. (d)	Deductions as above under Clause c, except that one-third be deducted off Ironwork of Masts and Spars, repairs to and renewal of all Machinery (inclusive of boilers and their mountings), and all Hawsers, Ropes, Sheets and Rigging.
Between 10 and 15 Years. (e)	One-third to be deducted off all repairs and renewals, except Ironwork of Hull and Cementing and Chain Cables, from which one-sixth to be deducted. Anchors to be allowed in full.
Over 15 Years. (f)	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off Chain Cables.
Generally. (g)	The deductions (except as to Provisions and Stores, Machinery and Boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and Provisions and Stores which have not been in use.

In the case of WOODEN or COMPOSITE ships:

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labor metalling are subject to a deduction of one-third.

In the case of SHIPS GENERALLY:

In the case of all ships, the expense of straightening bent ironwork, including labor of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages, and graving dock materials, shall be allowed in full.

RULE XIV—TEMPORARY REPAIRS

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

RULE XV—LOSS OF FREIGHT

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

RULE XVI—AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

RULE XVII—CONTRIBUTORY VALUES

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general

average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

RULE XVIII—ADJUSTMENT

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these Rules.

ANTWERP RULE, 1903

Rights to contribution in general average shall not be affected though the danger which gave rise to the sacrifice, or expenditure, may have been due to default of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such default.

RULES OF PRACTICE OF THE ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES

I

COMPENSATION AND EXPENSES OF MASTER

Where the voyage is broken up by reason of shipwreck or condemnation of the ship at a place short of the port of destination, the master shall be entitled to compensation from the general interests for the time necessarily occupied by him in transacting the business growing out of the disaster until his departure thence for the home port with the proceeds, general accounts and vouchers.

He shall also be entitled to a reasonable indemnification for his necessary expenses and services in returning to the home port when needed or required, by the peculiar circumstances of the case, to justify his acts at the place of disaster, or to give information, not otherwise afforded, to finally adjust and apportion the average charges to be paid by the general or special interests for whom such services are performed, to be determined by the nature of the case.

These rules shall apply whether the vessel be in ballast or with cargo.

II

INTEREST ON ALLOWANCES IN GENERAL AVERAGE

Where allowances, sacrifices or expenditures are charged or made good in general average, interest shall be allowed thereon at the legal rate prevailing at the place of adjustment.

III

DECK LOAD JETTISON

Where cargo consisting of one kind of goods is, in accordance with a custom of trade, carried on and under deck, that portion of the cargo loaded on deck shall be subject to the same rules of adjustment in case of jettison and expenses incurred, as if the same were laden under deck.

IV

LOSS OF FREIGHT ON CARGO SACRIFICED

When loss of freight on cargo sacrificed is allowed in general average, the allowance shall be for the net freight lost, to be ascertained by deducting from the gross freight the expenses that would have been incurred subsequent to the sacrifice to earn it.

V

Where salvage services are rendered to a vessel, or she becomes disabled and is necessarily towed to her port of destination, and the expenses of such towage are allowable in general average, there shall be credited against the allowance such ordinary expenses as would have been incurred, but have been saved by the salvage or towage services.

VI

CREDITS FOR OLD MATERIAL

Where old material is replaced by new, credit shall be given in the average statement for the value or proceeds of the old material, or, if there is no credit, the Adjuster shall insert a note in explanation.

VII

APPROVAL OF REPAIR ACCOUNTS

All repair accounts shall be examined, when practicable, by the owners' surveyor and a surveyor for underwriters before the statement is issued.

The Adjuster shall insert a note in the average statement that this has been done and the result of same.

VIII

SCRAPING AND PAINTING BOTTOM OF VESSEL

The cost of scraping and painting the bottom of a vessel consequent upon repairs which are recoverable in average shall be allowed, unless the vessel, at the time of drydocking, is due in the ordinary course for bottom painting, according to the custom of the owners, or, in the case of a vessel employed in salt water navigation, unless the bottom has not been painted within one year.

When the cost of scraping and painting the bottom is allowed, the Adjuster shall insert a note in the average statement giving the date of the last painting and the date on which, in the ordinary course, the vessel would have been due for repainting bottom.

IX-XI

(These three rules refer to Particular Average.)

XII

ALLOWANCE IN RESPECT OF PROVISIONS

When allowance is made in general average for provisions of Master, Officers, and Crew the allowance shall be on the following scale:

Master	$1.00 per day
Officers and Engineers	.75 " "
Crew	.50 " "

This rule shall apply to vessels on voyages to United States ports on the Atlantic Coast and in the Gulf of Mexico.

This rule shall also apply to voyages from the Atlantic and Gulf of Mexico ports of this country where the General Average Statement is stated in accordance with American law and usage.

RATES FOR ALLOWANCE FOR PROVISIONS *PER DIEM*—INTEREST

		Old Scale			New Scale			Legal Rate of Interest in State
		Master	Officers and Engineers	Men	Master	Officers and Engineers	Men	
Baltimore	sail & steam	$1.00	0.50	0.30	$1.00	0.75	0.50	6 %
Boston	do.	1.00	0.50	0.25	1.00	0.75	0.50	6 %
Charleston	do.	1.00	0.50	0.30	1.00	0.75	0.50	7 %
Connecticut (State of)	do.	1.00	0.50	0.25	1.00	0.75	0.50	6 %
Florida (State of)	do.	1.00	0.50	0.30	1.00	0.75	0.50	8 %
Galveston	do.	2.00	1.00	0.30	1.00	0.75	0.50	6 %
Mobile	do.	1.00	1.00	0.75	1.00	0.75	0.50	8 %
New Orleans	sail	1.00	0.75	0.50	1.00	0.75	0.50	5 %
do.	steam	1.50	1.00	0.75	1.00	0.75	0.50	5 %
New York	sail & steam	1.00	0.50	0.30	1.00	0.75	0.50	6 %
Norfolk	do.	1.00	0.50	0.30	1.00	0.75	0.50	6 %
Philadelphia	do.	1.00	(a) 0.50	0.33⅓	1.00	0.75	0.50	6 %
Portland, Me.	do.	1.00	0.50	0.25	1.00	0.75	0.50	6 %
Portland, Ore.	do.	1.50	0.75	0.40	.....	.....	.....	6 %
Rhode Island (State of)	do.	1.00	0.50	0.25	1.00	0.75	0.50	6 %
San Francisco	do.	1.50	0.75	0.40	.....	.....	.....	7 %
Savannah	do.	1.00	0.50	0.30	1.00	0.75	0.50	7 %
Seattle	do.	1.50	0.75	0.40	.....	.....	.....	6 %
Tacoma	do.	1.50	0.75	0.40	.....	.....	.....	6 %
Wilmington, N. C.	do.	1.00	0.50	0.30	1.00	0.75	0.50	6 %
Wilmington, Del.	do.	1.00	0.50	0.30	1.00	0.75	0.50	6 %

The old scale of rates for allowance for provisions, used in practice up to and including the year 1910, was adopted from information obtained from the Navy Department and other sources half a century or more ago when the prices of provisions were much less than at the present time, and, on the complaint of shipowners that it was quite inadequate to compensate them for the actual cost of maintenance under modern conditions, and after investigating the matter and finding that the complaint was well founded, new rates for allowance at certain ports were suggested and later adopted by the Association of Average Adjusters of the United States and embodied in their Rules of Practice (see Rule XII).

(a) Chief Engineer same rate as Master.

FORM OF GENERAL AVERAGE BOND

FORM PRESCRIBED BY THE ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES

AVERAGE BOND

WHEREAS, it being represented that the .....
whereof ..... is, or lately was Master,
having on board a cargo of .....,
in which we are interested as owners, shippers or consignees,
sailed from .....
or or about the ..... day of .....,
bound for .....,
and in the course of her said voyage .....
.....
.....
.....
and that thereby certain losses and expenses were incurred, and other and further losses and expenses, consequent thereon, may yet be incurred, and that such losses and expenses may be a charge, by way of General Average or otherwise, upon the vessel, her freight and cargo, or either of them,

Now, therefore, we, the Subscribers, owners, shippers or consignees of such of the cargo of said vessel as we have severally described and set opposite our respective signatures hereto, in consideration of the premises and of the delivery to us respectively of such cargo, or so much thereof as may be saved, without retention pending an adjustment of said losses and expenses, do hereby, for ourselves, our respective Executors and Administrators, severally and respectively, but not jointly, nor the one for the other, covenant and agree to and with .....
.....
Owners or Agents of the owners of the said vessel, and with one another that the losses and expenses aforesaid, or so much thereof, as, upon adjustment of the same to be stated by .....
.....
according to the laws and usages of this port in similar cases, may be shown to be a charge upon the said cargo, or upon any of the cargo of said vessel which may be received by us, shall be paid by us respectively, according to our several and respective parts or shares thereof, unto the said .....
when such adjustment is completed and due notice given thereof.

Provided, however, that if any of said cargo has been shipped under Bills of Lading containing an agreement that the York-Antwerp Rules shall be the rules of adjustment, such agreement shall not be affected thereby, but in all other respects this Bond shall remain in full force.

And we further promise and agree to furnish said Adjusters, upon their request, all information which they may deem necessary to a correct adjustment of this case.

This Bond may be executed in several parts of like tenor and date, the whole of which are to constitute but one Bond, with the same effect as if each of said parts were severally signed by us.

IN WITNESS WHEREOF, we have to these presents respectively set our hands, in the City of .....
this ..... day of .....,
one thousand, nine hundred and .....

Signatures	Marks and Nos.	Merchandise	Invoice Value	

FORM OF AVERAGE AGREEMENT

AVERAGE AGREEMENT

WHEREAS, the ....., whereof ..... was Master, having on board a cargo of merchandise, sailed from the port of ..... during the month of ....., bound for ....., and in the due prosecution of her said voyage, it is alleged, that .....
.....
.....
.....
And whereas by reason of the occurrences of the voyage, certain losses and expenses have been incurred, and other losses and expenses hereafter may be incurred, which may constitute a general average, to be apportioned on the said Vessel, her earnings as Freight and her Cargo, and other losses and expenses have been and may be incurred, which apply to and may be due from specific interests; Now, in consideration of the premises, we, the subscribers, owners, shippers, or consignees (or agents or attorneys of certain owners, shippers or consignees) of said Vessel, her earnings as Freight, or her Cargo, do hereby for ourselves personally, and our principals and executors and administrators, severally and respectively, but not jointly, or one for the other, covenant and agree to and with ..... and/or ....., as Trustees for all concerned, that all losses and expenses aforesaid, which shall be made to appear to be due from us or our principals, or from any firm of which we are or have been copartners, either as owners, shippers or consignees, shall be paid by us respectively, according to the part or share in the said Vessel, her earnings as Freight, or her Cargo, which shall belong to us or shall belong to or be consigned to any person or persons for whom we are agents, or attorneys, or with whom we are or have been partners or in which we are or have been in any manner concerned, provided that such losses and expenses shall be stated and apportioned by ....., Average Adjusters, in accordance with the *established usages and laws* in similar cases. And we do further bind ourselves to furnish promptly, on request of said Adjusters, all such information and documents as they may require from us to make said adjustment. This agreement may be executed in several parts of like tenor and date, the whole of which is to constitute but one agreement, with the same effect as if each of said parts were severally signed by us.

IN WITNESS WHEREOF, we have to these presents set our hands, in the City of ....., this ..... day of ....., in the year of our Lord, one thousand nine hundred and .....

Signatures	No. of Packages and Description.	Amount of Invoice.	Where Insured.

NOTE.—The main points of difference between the form of bond prescribed by the Association of Average Adjusters and the above form of agreement are as follows:

Bond Prescribed by Association of Average Adjusters.	*Average Agreement.*
Does not commit the signer to any statement of facts.	Contains positive recitals, setting forth as facts the port from which the vessel sailed, the time of her sailing and the port of destination.
Ditto. Ditto.	Contains a positive recital, setting forth as a fact that the vessel was "in the due prosecution of her said voyage."
Binds the signer only as owner, shipper or consignee of cargo.	Binds the signer *personally*, even though he sign as agent or attorney for owner, shipper or consignee of cargo.
Contains no provision to cover signature of vessel owner.	Contains a provision to cover, if necessary, signature of vessel owner.
Provides for payment to owners or agents of the vessel.	Provides for payment to a Trustee for all concerned.
Provides for adjustment "according to the laws and usages of this port in similar cases," and York-Antwerp Rules, if provided for in bill of lading.	Provides for adjustment "in accordance with the *established usages and laws* in similar cases."

FORM OF GUARANTEE FOR PAYMENT OF GENERAL AVERAGE AND OTHER CHARGES

.....19

.....

.....

In consideration of the delivery from the .....

of the following goods, viz.:

.....

.....

.....

Consigned to .....

without the requirement of a deposit, we hereby guarantee the payment of all General Average, Salvage and/or Special Charges for which said goods are liable.

.....

FORM OF DEPOSIT RECEIPT

GENERAL AVERAGE DEPOSIT RECEIPT

.....

RECEIVED from .....
..... Dollars
as a deposit to secure the payment of General Average, Salvage and/or Charges per ....., from .....
..... to ....., being ..... per cent. on $....., provisionally adopted as the net arrived value of the following merchandise:
.....
.....

Upon completion of the adjustment, the charges falling upon the above merchandise shall be paid from said deposit, if sufficient, and the excess, if any, shall be returned on endorsement and surrender of this receipt; or, if a balance is due, it shall be paid according to the terms of the average bond.

$.....

.....
Trustee.

APPLICATION FOR ANY REFUND IS TO BE MADE TO
.....
ADJUSTERS OF AVERAGES.

COMPARATIVE TABLE

Some of the differences between the laws and practices in the United States and those in Great Britain:

	UNITED STATES	GREAT BRITAIN.
Ultimate object of a General Average act.	Safe completion of the adventure.	Attainment of physical safety.
When vessel in ballast, under charter, and proceeding to loading port.	Only vessel contributes.	Interests contributing are vessel and net freight under pending charter.
When vessel puts into port of refuge to repair damage in *nature of Particular Average;* the voyage being subsequently resumed:		
Expenses of entering port.	General Average.	General Average.
Cost of discharging cargo for common benefit or to repair vessel.	General Average.	General Average.
Cost of conveying cargo to store.	General Average.	General Average.
Damage to cargo while being discharged for common benefit or to repair vessel.	General Average.	General Average.
Damage to cargo while in store by fire.	Cargo.	Cargo.
Cost of storing cargo.	General Average.	Special charge on cargo.
Hire of hulks or lighters for cargo discharged into them instead of being sent ashore.	General Average.	Cost of hire divided between General Average, cargo and freight.

	UNITED STATES.	GREAT BRITAIN.
Cost of reloading cargo.	General Average.	Special charge on freight.
Outward port charges.	General Average.	Special charge on freight.
Wages and Provisions of Master, Officers and crew from date of deviation until vessel ready to proceed on voyage.	General Average (exclusive of passenger service).	Owners.
Coal and engine stores, ditto.	General Average.	Owners.
Cost of reasonable *temporary* repairs at intermediate port of damage arising from excepted perils necessary to make vessel seaworthy to resume voyage, and resulting in a saving of general average and other expenses.	Apportioned, in practice, as a *substituted* expense on the saving effected to all parties to the adventure. Temporary repairs made solely to save excessive cost of permanent repairs are chargeable to owners.	Owners.
Cutting away of vessel's materials when in a state of *wreck*.	General Average if there was, at the time, a reasonable chance of saving the property but for the continuance of the storm, and, if saved, it would have been of value. Usual deductions "new for old," and further deductions for depreciation as per scale (see pp. 86-87).	Not General Average unless of value when cut away and, owing to exceptional circumstances, a reasonable possibility existed of recovering them. Usual deductions "new for old" and for any damage sustained before being cut away.
Damage to vessel and/or cargo by *voluntary* stranding.	General Average.	Not General Average (except when vessel beached or scuttled to extinguish fire on board).
Damage to vessel and/or cargo in extinguishing fire by *Port Authorities* not called in by Master or in his absence by the person in command of the vessel.	Not General Average.	General. Average
Deductions from cost of repairs to vessel necessitated by a General Average act.	One-third from cost of all repairs, whether to wooden, iron or steel vessels, except where there is no betterment.	One-third, with certain exceptions, deducted from *wooden* vessels, except where there is no betterment. From iron or *steel* vessels deductions same as under York-Antwerp Rules.

	UNITED STATES.	GREAT BRITAIN.
Chain cables.	*One-third* is deducted "new for old."	*One-sixth* is deducted "new for old."
When a *constructive total loss* of a vessel occurs through General Average and Particular Average damage combined.	Upon the estimates of cost of repairing the General and Particular Average damages is apportioned the sound value of the vessel before the accident (less her net proceeds) without deduction of "new for old."	The allowance in General Average, and without deduction of "new for old," is arrived at by first ascertaining the sound value of the vessel before the accident, from which is deducted her net proceeds, and from the remainder the estimated cost of repairing the Particular Average damages.
Expenses of complex salvage operations.	Entire expenses General Average if operations can be properly regarded as part of a continuous operation for common benefit.	Expenses General Average only up to time when common danger ceases.
Apportionment of Salvage Charges:		
1. When amount is awarded by Court for services rendered on the "no cure, no pay," basis, or independently of contract, and award made upon agreed values of property saved.	Apportioned as *general average* upon arrived values at destination, *in*cluding any amounts made good for sacrifices.	Treated as a *special charge* upon values admitted or adopted by the Court.
2. When amount is paid for services rendered under agreement or contract.	Ditto.	Apportioned as *general average* upon arrived values at destination, *ex*cluding any amounts made good for sacrifices.
Cost of towing a disabled vessel from port of refuge to destination.	Special Charge on freight, but usually agreement made between Owners and Underwriters to charge cost of towing to General Average and to shipowner in proportion to the expenses saved to each by the course adopted.	As per Rule 10 (Sect. d.), York-Antwerp Rules.
Freight to contribute to General Average.	One-half in some States and two-thirds in others, of pending freight earned (see p. 158).	Gross amount at risk, less expenses to earn it incurred *after* General Average act.

	UNITED STATES.	GREAT BRITAIN.
Shipowners' commission on General Average disbursements.	General Average.	Not allowed in General Average.
Interest on General Average disbursements and on allowances to vessel and cargo.	General Average.	Not allowed in General Average.
Commission collecting and settling General Average.	General Average.	Not allowed in General Average.
Negligence.	A shipowner can legally contract with cargo owners for a participation by them in a general average contribution arising from negligence of his servants, under circumstances where by the Harter Act he is relieved from responsibility for the negligence.	If the contract of affreightment contains a clause whereby the shipowner is exempted from liability for negligence of his servants, he is entitled to contribution from the cargo for general average losses and expenses, notwithstanding that they were occasioned through such negligence. The clause by itself eliminates the negligence from consideration and has the effect of putting the shipowner in the position of an innocent party as between him and the cargo owner.

HARTER ACT

Prior to the passage of the Harter Act it was held by the Federal Courts that a common carrier could not lawfully contract against his liability and that of his vessel for loss or damage occasioned by the negligence or fault of his servants, on the ground that such contract was contrary to public policy. The owners of American vessels were thus at a decided disadvantage as compared with foreign owners who can contract against such liability, and in passing the Harter Act Congress removed to some extent this disadvantage by exempting *carrying* vessels, provided certain conditions as to seaworthiness are complied with, from liability for damage or loss *resulting from faults or errors in the navigation or management of the vessel.*

The full text of the Act is as follows:

CARRIERS' ACT, FEBRUARY 13, 1893

An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to

carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, master, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

SEC. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

SEC. 7. Sections one and four of this act shall not apply to the transportation of live animals.

SEC. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13, 1893.

Note:—Acts similar to the Harter Act were passed by the Parliaments of New Zealand (1903), Australia (1904) and Canada (1910).

Attention of the reader is called to the following brief summaries of some decisions and dicta of the Courts in connection with the Harter Act.

GENERAL

Liability of one vessel to another and to the latter's cargo is not affected by the Act, it applying only to the *carrying* vessel and her cargo. (The *Delaware,* U. S. Sup. Ct. 16 Sup. Ct. Rep. 516 [1896]; The *Chattahochee,* U. S. Sup. Ct. 19 Sup. Ct. Rep. 491 [1899].)

The Act is inapplicable to transportation of passengers or their baggage when not shipped as cargo. (The *Kensington,* Dist. Ct. N. Y. 88 Fed. Rep. 331 [1898]; The *Rosedale,* Dist. Ct. N. Y. 88 Fed. Rep. 324 [1898].)

When the terms and provisions of the Act are by reference expressly adopted in bills of lading it is equivalent to a recital in them of all the provisions and exemptions of the Act; so that these provisions and exemptions then have the force both of *statute* and of *contract.* (The *Manitoba,* Dist. Ct. N. Y. 104 Fed. Rep. 145 [1900].)

SECTION 1

Section 1 applies to a vessel on a voyage from a foreign port to a port in the United States, and to a vessel on a voyage which begins in the United States, whether it ends in a domestic or foreign port. (*Knott* v. *Botany Worsted Mills,* U. S. Sup. Ct. 21 Sup. Ct. Rep. 30 [1900].)

A stipulation in a bill of lading that *the law of the vessel's flag* shall govern for goods in a foreign vessel on a voyage from a foreign port to the United States, whereby it is sought to exempt the carrier from liability for negligence in the loading, stowage, etc., of the cargo, is nullified and overriden by Section 1. (*Knott* v. *Botany Worsted Mills,* U. S. Sup. Ct. 21 Sup. Ct. Rep. 30 [1900].)

A bill of lading which stated in the usual printed form that the cargo was shipped in good order and condition contained a notation that the vessel was "not responsible for broken or cut bales." The stevedores who loaded the cargo were under the direction and control of the master. It was held that the notation on the bill of lading was in violation of Sec-

tion 1 of the Act in that it was an attempt to relieve the vessel from liability "arising from negligence, fault or failure in proper loading, stowage, custody," etc. (*Bethel* v. *Mellor & Rittenhouse Co.*, Dist. Ct. Penn. 131 Fed. Rep. 129 [1904].)

A condition of instability in a vessel brought about by the improper unloading of the cargo is not a fault or error in "the management of the vessel," but is a fault in the "care or proper delivery" of the cargo within the meaning of Section 1. (*Oceanic Steam Nav. Co.* v. *Aitken* (The *Germanic*), U. S. Sup. Ct. 25 Sup. Ct. Rep. 317 [1905].)

A stipulation in a bill of lading by which the shipper waives any lien upon the vessel for breach thereof caused by negligence is forbidden by Section 1, and independently of the Act is contrary to public policy and void. (The *Tampico*, Dist. Ct. Calif. 151 Fed. Rep. 689 [1907].)

Section 1 has no application to a contract between a shipper and a *private* carrier, and a provision of the contract by which for a consideration the shipper agrees to exempt such carrier from liability for loss or injury to cargo from negligence is valid and enforceable. (The *Fri*, Cir. Ct. of App. 154 Fed. Rep. 333 [1907]; The *Maine*, Dist. Ct. N. Y. 161 Fed. Rep. 401 [1908], Cir. Ct. of App. 170 Fed. Rep. 915 [1909].)

The action of the master in intentionally allowing oil which leaked from barrels to remain in the bilges, not for ship's purposes, but with the object of saving it by pumping it out at the end of the voyage, did not pertain to the "management of the vessel" within Section 3; and damage to other cargo from such oil arose from "fault or failure in proper care of the cargo" within Section 1. (The *Persiana*, Cir. Ct. of App. 185 Fed. Rep. 396 [1911].)

The negligent failure of the master of a vessel to properly use the *ventilating equipment* during the voyage, by reason of which the cargo sustains damage, is not a fault or error in the "management of the vessel" under Section 3; but is "negligence, fault, or failure in proper * * * care of * * * merchandise or property" within Section 1, for which the shipowner is liable. (The *Jean Bart*, Dist. Ct. Calif. 197 Fed. Rep. 1002 [1911].)

SECTION 2

It is not in violation of Section 2 to stipulate in a bill of lading that the obligation of the carrier in the matter of *seaworthiness* of the vessel shall be limited to the exercise of *due diligence* to make her seaworthy in all respects. The Court stated:

> "It is competent for the parties by express contract to modify the obligations which would otherwise devolve upon the carrier, including even that of providing a seaworthy vessel; and short of any modification which will exempt him from the consequences of

his own misconduct or negligence, or those for whom he is responsible, such contracts, though strictly construed against the carrier, are given full effect." (The *Prussia,* Cir. Ct. of App. 93 Fed. Rep. 837 [1899]; see also The *Ontario,* Dist. Ct. N. Y. 106 Fed. Rep. 324 [1900].)

The provision of Section 2 relates to contracts between carrier and shipper, and does not apply to a charter by which a vessel is demised. (*Golcar S. S. Co., Ltd.,* v. *Tweedie Trading Co.,* Dist. Ct. N. Y. 146 Fed. Rep. 563 [1906].)

SECTION 3

As Section 3 provides that, if the owner of a vessel has exercised due diligence to make her seaworthy and properly manned, equipped and supplied, neither the vessel nor her owner, etc., shall be responsible for damage to or loss of cargo resulting "from saving or attempting to save life or property at sea, or from any deviation in rendering such service," the value of the cargo at risk in a *salving* vessel while on a voyage to or from a port in the United States need not be considered when awarding compensation for services rendered. (The *Chinese Prince,* Dist. Ct. S. C. 61 Fed. Rep. 697 [1894]; The *Florence,* Dist. Ct. N. Y. 65 Fed. Rep. 248 [1895]; The *Alaska,* Dist. Ct. N. Y. 75 Fed. Rep. 430 [1896]; The *Ereza,* Dist. Ct. Penn. 124 Fed. Rep. 659 [1903].)

Section 3 also applies to vessels engaged in commerce on the Great Lakes. (The *E. A. Shores, Jr.,* Dist. Ct. Wisc. 73 Fed. Rep. 342 [1896].)

While a vessel and her owner, etc., are relieved by Section 3 from liability for loss resulting "from saving or attempting to save life or property at sea, or from any deviation in rendering such service," they are not relieved; if the vessel *further* deviates from her course after the lives and property are in safety, from liability for loss or damage which occurs during such further deviation. (*In re Meyer,* Dist. Ct. Calif. 74 Fed. Rep. 881 [1896].)

Section 3 was held to apply to vessels engaged in commerce on the Bay of San Francisco and between different ports on such bay. (*In re Piper Aden Goodall Co.,* Dist. Ct. Calif. 86 Fed. Rep. 670 [1898].)

In a case of collision due to mutual fault resulting in the loss of one vessel and her cargo, Section 3 does not prevent the surviving vessel, which alone is sued by the owners of the cargo on the lost vessel, from recouping one-half of the amount of the cargo loss from the half damages awarded to the owners of the lost vessel. The latter are thus in effect, by operation of the Admiralty law, made to suffer indirectly for a cargo loss on their own vessel for which by the direct terms of Section 3 they are exonerated. (The *Chattahoochee,* U. S. Sup. Ct. 19 Sup. Ct. Rep. 491 [1899].)

Section 3 applies to foreign vessels carrying cargo to or from ports of the United States. (The *Silvia,* U. S. Sup. Ct. 19 Sup. Ct. Rep. 7

[1898]; *Knott* v. *Botany Worsted Mills,* U. S. Sup. Ct. 21 Sup. Ct. Rep. 30 [1900].)

The words "*navigation*" and "*management*" of a vessel within the meaning of the Act were defined as follows:

> "They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas." (The *Silvia,* U. S. Sup. Ct. 19 Sup. Ct. Rep. 7 [1898].)

While Section 3 exonerates a shipowner from loss of or damage to cargo resulting from faults or errors in navigation or management of the vessel, provided it is shown that due diligence was used to make her seaworthy, it does not relieve him nor the vessel from liability for the consequences of *unseaworthiness,* even if it is proved that due diligence was used to make the vessel seaworthy. It is incumbent upon the shipowner to provide a seaworthy vessel, unless by *contract* he limits his obligation to the exercise of due diligence to make her so. (The *Carib Prince,* U. S. Sup. Ct. 18 Sup. Ct. Rep. 753 [1898]; The *Sandfield,* Cir. Ct. of App. 92 Fed. Rep. 663 [1898]; *Farr & Bailey Mfg. Co.* v. *International Nav. Co.,* Cir. Ct. of App. 98 Fed. Rep. 636 [1899]; The *Ninfa,* Dist. Ct. Ore. 156 Fed. Rep. 512 [1907]; The *Indrapura,* Cir. Ct. of App. 190 Fed. Rep. 711 [1911].)

Notwithstanding that a shipowner has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under Section 3, he has no right under the Act to general average contribution for sacrifices made and suffered by him subsequent to a *negligent* stranding of the vessel, in successful efforts to save vessel, freight and cargo. (The *Irrawaddy,* U. S. Sup. Ct. 18 Sup. Ct. Rep. 831 [1898].)

An error of judgment of the master as to the extent of repairs necessary to a vessel in a port of distress where he exercises due and reasonable care and diligence and acts in good faith is an error in the "management" of the vessel within Section 3, and does not render the shipowner liable for damage to the cargo which might have been prevented had more extensive repairs been made. (The *Guadeloupe,* Dist. Ct. N. Y. 92 Fed. Rep. 670 [1899].)

The loading, stowage, custody, care and delivery of cargo have no relation to the "management of the vessel," within the meaning of Section 3. (The *Manitoba,* Dist. Ct. N. Y. 104 Fed. Rep. 145 [1900].)

Section 3 does not affect the operation of the equitable rule which gives priority to the claim of the innocent cargo owner over that of the owner of the carrying vessel against a fund available for the payment of damages sustained through a collision for which both vessels have been adjudged in fault. (The *Geo. W. Roby,* Cir. Ct. of App. 111 Fed. Rep. 601 [1901].)

Negligence in loading or stowing of cargo *at a port of call* is not negligence "in the management of the vessel" within the meaning of the Act. (*Knott* v. *Botany Worsted Mills,* U. S. Sup. Ct. 21 Sup. Ct. Rep. 30 [1900].)

Due diligence within the meaning of the Act means not only furnishing proper structure and equipment, but means due diligence on the part of all the shipowner's servants in the use of the equipment, before the commencement of the voyage and until it is actually commenced. (*International Nav. Co.* v. *Farr & Bailey Mfg. Co.,* U. S. Sup. Ct. 21 Sup. Ct. Rep. 591 [1901].)

The burden of *affirmatively* proving the seaworthiness of a vessel at time of loading of the cargo and at the commencement of the voyage, or that he used due diligence to obtain that end, rests upon the shipowner, and it is a condition precedent before he can claim the benefit of the exemption from liability provided for in Section 3 regarding damage or loss "resulting from faults or errors in navigation or in the management of the vessel." (*International Nav. Co.* v. *Farr & Bailey Mfg. Co.,* U. S. Sup. Ct. 21 Sup. Ct. Rep. 591 [1901]; The *Wildcroft,* U. S. Sup. Ct. 26 Sup. Ct. Rep. 467 [1906]; *Bradley* v. *Lehigh Valley R. Co.,* Cir. Ct. of App. 153 Fed. Rep. 350 [1907].)

Stipulations in a bill of lading cannot relieve a carrier from the discharge of his initial duty under the Act to use due diligence to furnish a seaworthy vessel. (*Martin* v. *The Southwark,* U. S. Sup. Ct. 24 Sup. Ct. Rep. 1 [1903].)

A condition of instability in a vessel due to improper loading of the cargo which rendered her unseaworthy at the beginning of the voyage and to which initial instability damage to cargo is attributable is not a fault or error in the "management of the vessel" within the meaning of Section 3. (The *Oneida,* Cir. Ct. of App. 128 Fed. Rep. 687 [1904].)

A lighter with cargo loaded at a pier in Brooklyn for a pier in the North River, New York, was lying at the latter pier and sank, owing to injuries caused by an ice jam. There was no steam available to work the pumps, owing to the fires being banked and, according to custom, the Master, Engineer and most of the crew were absent from the vessel. It was held that while the damage to and loss of cargo arose from fault in the management of the vessel at her discharging pier, *the fault was not initiated there,* but by the owner in presumably consenting to the vessel being improperly manned and equipped at her place of discharge, and consequently that Section 3 of the Act was inapplicable. (The *Valentine,* Dist. Ct. N. Y. 131 Fed. Rep. 352 [1904].)

A condition of instability in a vessel brought about by the improper unloading of the cargo is not a fault or error in the "management of the vessel" within the meaning of Section 3, but is a fault in the "care or proper delivery" of the cargo within the meaning of Section 1.

(*Oceanic Steam Nav. Co.* v. *Aitken* [The *Germanic*], U. S. Sup. Ct. 25 Sup. Ct. Rep. 317 [1905].)

On the contention of the shipowner that any dealing with the cargo which affects the fitness of the ship to carry her cargo is "management of the vessel" within the meaning of Section 3 the Supreme Court stated as follows:

> "If the primary purpose is to affect the ballast of the ship, the change is management of the vessel; but if * * * the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third."

The exemption in Section 3 from fault or error in navigation or in the management of the vessel was held to apply to a case where, by reason of the determination of the Master to proceed on the voyage without putting into a port for repairs to the vessel, damage to cargo was increased. The Court made the distinction that the increased damage to cargo was not due to *direct* want of care of it under Section 1, but arose in respect of a fault *primarily* connected with the navigation and management of the vessel under Section 3, the increased damage to the cargo being incidental to such fault. (*Corsar* v. *J. D. Spreckels & Bros. Co.* [The *Musselcrag*], Cir. Ct. of App. 141 Fed. Rep. 260 [1905].)

Section 3 applies only after the voyage is commenced. A lighter, having loaded only a part of her cargo, sank while lying at a pier in New York owing to negligence of the watchman. The cargo had been shipped originally at a Southern port under through bills of lading for transportation to New York, there to be lightered to a steamer for transportation to a port in Europe. It was held that when the entire transportation is made up of successive stages by successive vessels Section 3 applies to the particular vessel whose navigation or management has been faulty or erroneous. (*Ralli* v. *New York & T. S. S. Co.*, Cir. Ct. of App. 154 Fed. Rep. 286 [1907]; see also *S. S. Wellesley Co.* v. *C. A. Hooper & Co.*, Cir. Ct. of App. 185 Fed. Rep. 733 [1911].)

The navigation and management of a vessel within the meaning of Section 3 include the determination of the time and manner of leaving port, which is the prerogative of the Master; and under that Section, if its provisions as to seaworthiness have been complied with, the shipowner is not liable for loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the Master in failing to ascertain or heed the warnings of the Weather Bureau before starting on the voyage. (*Hanson et al.* v. *Haywood Bros. and Wakefield Co.*, Cir. Ct. of App. 152 Fed. Red. 401 [1907].)

Relief from liability for robbery or theft of cargo by those belonging to the vessel cannot be obtained under the provisions of the Act. (The *Seneca*, Dist. Ct. N. Y. 163 Fed. Rep. 591 [1908].)

Section 3 protects the shipowner, whether he is acting as a common carrier or as a bailee. (*Sun Co.* v. *Healy*, Cir. Ct. of App. 163 Fed. Rep. 48 [1908].)

The tipping of a vessel by the Master while she was lying alongside a wharf discharging cargo in order to examine the propeller, and having nothing to do with the discharge of the cargo, was held to be an act of management of the vessel falling within Section 3, and if the owner had complied with the requirements of that Section at the commencement of the voyage, it was held that neither he nor the vessel was liable for resulting injury to the cargo from a broken suction pipe.

The Court held further that the shipowner was not deprived of the protection given by Section 3 against liability for damage to the cargo resulting from the broken pipe because it was not proved that the pipe was inspected at the commencement of the voyage, it having been shown that it was in good condition after the voyage commenced, that the break was new and was sufficiently accounted for by the straining of the vessel during very rough weather on the voyage. (The *Indrani*, Cir. Ct. of App. 177 Fed. Rep. 914 [1910].)

The duty and right of the shipowner, as bailee, to sue, for the benefit of cargo owners, for injuries caused by others to their property, recognized in the maritime law, does not rest on the measure of liability for carriage and delivery under the bill of lading and is therefore not affected by the provisions of the Act. (*Erie & Western Transp. Co.* v. *City of Chicago*, Cir. Ct. of App. 178 Fed. Rep. 42 [1910].)

Section 3 applies only to the vessel and the cargo with which she is herself laden. It does not exempt the owner of a tug from liability for damage to or loss of cargo of a barge through negligent towage, notwithstanding that such owner is also the owner of the barge, and is in fact the carrier "transporting" the cargo. (*Baltimore & Boston Barge Co.* v. *Eastern Coal Co.*, Cir. Ct. of App. 195 Fed. Rep. 483 [1912].)

Note:—On July 1, 1912, there was introduced in the Senate of the United States by Senator Nelson of Minnesota a bill, known as the Nelson Bill, the object of which is to amend the Harter Act, and this bill will no doubt be debated at the present session of Congress. The following is a summary of the differences between the provisions of the Harter Act and those of the Nelson Bill:

Section 1. To this section of the Harter Act which provides that it shall not be lawful for the owners, managers, agents or masters of vessels to insert in bills of lading or shipping documents any clauses relieving themselves from liability for loss or damage arising from negligence or faults of certain kinds, the Nelson bill adds the words "or from faults or errors in the navigation or management of said vessel."

The Nelson bill also adds to this section a provision making it unlawful to insert in bills of lading or shipping documents any clause or agreement whereby the liability of the shipowner is limited to less than the market value at the time and place of shipment of any merchandise or property which may be committed to his charge.

Section 3.—The exemption in this section of the Harter Act from liability for damage or loss resulting from faults or errors in navigation or in the management of a vessel is applicable to vessels trading "to or from any port in the United States." The Nelson bill makes this ex-

emption applicable only to vessels trading "between ports in the United States." The Nelson bill exempts the shipowner from liability for damage or loss resulting from "latent defects in said vessel" and this is applicable both to domestic and foreign vessels. The Harter Act contains no provision for exemption from such liability.

Section 4.—To the end of this section of the Harter Act has been added the following clause:

Every bill of lading or shipping receipt relating to the carriage of merchandise or property from a port in the United States to a foreign port shall contain a provision to the effect that the shipment is subject to all the terms and provisions of and all the exemptions from liability contained in this Act; and any stipulation or agreement purporting to oust or lessen the jurisdiction of the courts of the United States or of any State thereof having jurisdiction at the port of loading in respect of the bill of lading or shipping document, shall be null and void and of no effect.

FORM OF AGREEMENT TO SECURE TO SALVOR CHARGES FOR SALVAGE OR OTHER SERVICES

In case of the .....
.....

Services having been rendered to the above vessel and cargo by
.....
.....
who claim a lien therefor upon the property saved or assisted and it being desirable that the Vessel and cargo should proceed or be discharged without delay and unnecessary expense, which is consented to upon and in consideration of the execution of these presents. Now, therefore, the undersigned, representing the Vessel and the cargo or the portions of such cargo set opposite our respective names in consideration of the premises and to the extent of the value of the Vessel and the proceeds realized from the cargo so represented by us, do hereby agree to hold ourselves bound to the said .....,
until said .....
is paid our pro rata proportion of the charges or compensation for the services, as aforesaid, as soon as the amount of said charges can be properly determined. And in case of legal proceedings to enforce the lien or determine the amount thereof we engage to cause due appearance, claim and stipulations to be made in like manner and with like effect as if such Vessel and cargo were actually libeled and seized, and claimed, and stipulated for in regular cause of Admiralty proceedings. Such legal proceedings to be had in the United States District Court, for the.....
or ..... District of ....., at .....

Dated, ...

FORM OF AGREEMENT TO SECURE GENERAL AVERAGE CONTRIBUTION PAYABLE BY VESSEL TO CARGO

WHEREAS it is alleged that the ....., having on board a cargo of merchandise laden at ....., bound to ....., and sailing on or about the ..... day of ....., 191 , ...
.....
and the cargo suffered damage by .....

AND WHEREAS the owners of said cargo claim a lien on said vessel for such portion of such damage as said vessel may be liable for in general average, but the amount of such lien cannot be determined at present:

AND WHEREAS the said vessel now is in the port of ..... and security has been demanded by or on behalf of said cargo owners for said damages; but said cargo owners, only in consideration of the execution of these presents and of the giving of the security hereinafter provided for, have consented not to libel or detain said steamer at ..... pending the completion of the adjustment of the general average now in process of being made by .....

NOW, THEREFORE, in consideration of the premises and of the sum of one dollar to us in hand paid by ..... as Trustees for the above mentioned cargo owners, the receipt of which is hereby acknowledged, and in order that said vessel be not libeled or detained at ..... pending such adjustment of general average, we hereby covenant and agree to and with said ....., as such Trustees, to pay to said ....., as such Trustees, upon completion of the adjustment so being made by them according to the laws and usages in similar cases, and upon notice to us thereof, the share of the vessel in general average of the damages aforesaid for which said vessel may be found to be liable upon such adjustment:

AND in case of legal proceedings to enforce such lien or determine any or all of the amounts so payable, or to collect the same, we further engage to cause due appearance, claim and stipulations for costs and value to be made in like manner and with the like effect as if said vessel were actually libeled and seized and claimed and stipulated for in regular cause of Admiralty proceedings.

AND we further agree to furnish herewith security in the sum of ..... dollars, with sureties satisfactory to said cargo owners, for the faithful performance of this agreement and for the punctual payment to ....., as such Trustees, of all such amounts as may be payable by or on behalf of said vessel and/or her owners by reason of the damages as aforesaid.

WITNESS our hands at ..... this ..... day of ....., nineteen hundred and .....

In presence of:

.....

FORM OF BOTTOMRY BOND

BOTTOMRY BOND

Principal, $.....
Maritime Interest, ...

$.....

KNOW ALL MEN BY THESE PRESENTS, that I, ..., now Master of the ..... called the ....., of the port of ....., of the burthen of ..... tons, or thereabouts, now lying at the port of ....., and bound for ....., ..., am held and firmly bound unto .... of ....., in the penal sum of .... ($.....) lawful money of the United States of America, to be paid to the said ..... or to ....., certain Attorney or Attorneys, Executors, Administrators or Assigns; for which payment well and truly to be made, I bind myself, my Heirs, Executors and Administrators, and every one of them, and also the said vessel, her hull, tackle and apparel, ..., her owners, or whoever may become her owner or owners, firmly by these presents.

Signed with my hand and sealed with my seal at the City of ....., this ..... day of ..... A. D. one thousand nine hundred and .....

SIGNED, SEALED and DELIVERED
in the presence of

..... (L. S.)

WHEREAS, the said ..... did recently on a voyage from ..... for .... In consequence whereof, and the other occurrences of the voyage, various

expenses have been incurred on behalf of said vessel, which being unpaid now constitute a lien thereon.

AND WHEREAS the said Master has no funds for that purpose, nor can he upon his own personal credit, nor that of the owners of the said vessel, nor from the charterers of said vessel, raise and supply the requisite funds therefor, he having made or endeavored to make direct application to said parties therefor.

AND WHEREAS, in the emergency above stated, he received from ..... the funds indispensable to the payment and satisfaction of the said expenses of the said ..... in the said port of ....., who agreed to make the said advances, and to take a Bottomry Bond on the said vessel, her hull, tackle, and apparel, ... at the rate or premium of ..... per cent., for the voyage from the port of ..... to .....

AND WHEREAS the said vessel being now ready for sea, to leave the port of ..... as soon as wind and weather serve, after the execution of these presents, the said ..... ha.... accordingly made the said advances for the purposes aforementioned, amounting to the sum of .... ($.....), which sum is to run at bottomry on the said ....., her hull, tackle, and apparel, ... at the maritime premium of ..... per cent., amounting to the further sum of .... ($.....), making together the sum of .... ($.....), the whole of which, exclusive of the said premium, has been necessarily expended in and for the use and benefit of the said vessel, to enable her to prosecute her voyage.

And for the better security of the said sum and premium the said Master doth by these presents hypothecate and assign over to the said ....., or to ..... Heirs, Executors, Administrators and Assigns, the said ....., her hull, tackle, and apparel, ...

And it is hereby declared that the said ....., her hull, tackle, and apparel, ..., is thus hypothecated and assigned over for the security of the money so borrowed, and taken up as aforesaid, and shall be consigned to the assignees of this Bond, to be by them held until the said sum of .... ($.....) be justly, duly and fully paid, according to the conditions following, and shall be delivered for no other use or purpose whatever.

NOW THE CONDITIONS OF THIS OBLIGATION ARE SUCH, that if the above bounden ..... shall well and truly pay, or cause to be paid, unto the said ....., or to ....., certain Attorney, Executors, Administrators and Assigns, the just and full amount of .....

($.....) at or before the expiration of ..... days after the arrival of the said vessel at her anchorage in the port of ....., or at such other port or place at which the voyage may be terminated, or in case of loss of or damage to the said ..... such an average as shall by custom become due on the salvage; then this obligation and the said hypothecation to be void and of no effect.

If, however, the said amount, together with the premium, shall not be paid within ..... days as above specified, then this obligation and hypothecation shall remain in full force and virtue, and an additional premium of ..... per cent. on the above amount advanced shall be chargeable to and paid by the above bounden, and the assignees hereof are hereby empowered and authorized to ..... dispose of the said vessel at public auction, or otherwise, to liquidate and defray this obligation, and also all charges, costs and interest ruling at the port at which this obligation is made payable, and refund to the owners, or their representatives, any surplus; and any and all legal or other expenses necessarily incurred in the enforcement of this bond shall be equally due and payable hereunto.

Under no circumstances shall any subsequent indebtedness of the said vessel or her owners in any way affect or cancel the efficiency of this bond.

It is hereby further understood and agreed that the amount of the foregoing bond shall in no wise contribute toward Particular Average and that the rate of exchange has been fixed at .....

Having signed and executed ..... bonds, all of the same tenor and date, one of which being accomplished, the others to be void and of no effect.

WITNESS my hand and seal at ....., the day and year first above written.

SIGNED, SEALED and DELIVERED
in the presence of

..... (L. S.)

State of..... } ss.:
County of..... }

On this ..... day of ..... A. D. one thousand nine hundred and ....., before me personally appeared ...., Master of the ....., who acknowledged that he duly executed the foregoing Bottomry Bond for the purposes therein named.

IN TESTIMONY WHEREOF I have hereunto set my hand and seal of office.

.....
Notary Public.

FORM OF RESPONDENTIA BOND

RESPONDENTIA BOND

Principal, $.....
Maritime Interest, ...

$.....

KNOW ALL MEN BY THESE PRESENTS, THAT I, ..., now Master of the ..... called the ....., of the port of ....., of the burthen of ..... tons, or thereabouts, now lying at the port of ....., and bound for ....., ..., as agent for cargo of said vessel now loaded or to be laden thereon and consisting of ....., am held and firmly bound unto .... of ....., in the penal sum of .... ($.....) lawful money of the United States of America, to be paid to the said ..... or to ....., certain Attorney or Attorneys, Executors, Administrators or Assigns; for which payment well and truly to be made, I bind the said cargo, the owner, or whoever may become the owner or owners of such cargo, firmly by these presents.

Signed with my hand and sealed with my seal at the City of ....., this ..... day of ..... A. D. one thousand nine hundred and .....

SIGNED, SEALED and DELIVERED
in the presence of

..... (L. S.)
Agent for Cargo.

WHEREAS the said ..... did recently on a voyage from ..... for .... In consequence whereof, and the other occurrences of the voyage, various expenses have been incurred on behalf of said cargo, which being unpaid now constitute a lien thereon. And whereas said expenses must be paid

and said lien satisfied before said cargo will be allowed to leave said port.

AND WHEREAS the said Master has no funds for that purpose, nor can he upon his own personal credit, nor that of the owners of the said cargo, nor from the charterers of said vessel, nor shippers of the said cargo, raise and supply the requisite funds therefor, he having made or endeavored to make direct application to said parties therefor.

AND WHEREAS, in the emergency above stated, he received the funds indispensable to the payment and satisfaction of the said expenses due by the said cargo in the said port of ..... from ....., who agreed to make the said advances and to take a Respondentia Bond upon the said cargo at the rate or premium of ..... (.....%) for the voyage from the port of ..... to .....

AND WHEREAS the said vessel being now ready for sea, to leave the port of ..... as soon as wind and weather serve, after the execution of these presents, the said ..... ha.... accordingly made the said advances for the purposes aforementioned, amounting to the sum of .... ($.....), which sum is to run at respondentia on the said cargo at the maritime premium of ..... per cent., amounting to the further sum of .... ($.....), making together the sum of ..... ($.....), the whole of which, exclusive of the said premium, has been necessarily expended in and for the benefit of the said cargo.

And for the better security of the said sum and premium, the said Master doth by these presents hypothecate and assign over to the said ....., or to his or their Heirs, Executors, Administrators and Assigns, the said cargo.

And it is hereby declared that the said cargo is thus hypothecated and assigned over for the security of the money so borrowed, and taken up as aforesaid, and shall be consigned to the assignees of this Bond, to be by them held until the said sum of .... ($.....) be justly, duly and fully paid, according to the conditions following, and shall be delivered for no other use or purpose whatever.

NOW THE CONDITIONS OF THIS OBLIGATION ARE SUCH, that if the above bounden, the owner or owners of the said cargo, shall well and truly pay, or cause to be paid, unto the said ..... or to his or their certain Attorney, Executors, Administrators and Assigns, the just and full amount of .... ($.....) at or before the expiration of ..... (.....) days after the arrival of the said vessel at her anchorage in the port of ....., or at such other port or place at which the voyage may be terminated, or in case of loss of or damage to the said cargo, such an average as shall by custom become due on the salvage; then this obligation and the said hypothecation to be void and of no effect.

If, however, the said amount, together with the premium, shall not be paid within ..... (.....) days as above specified, then this obligation and hypothecation shall remain in full force and virtue, and an additional premium of ..... per cent. on the above amount advanced shall be chargeable to and paid by the above bounden, and the assignees hereof are hereby empowered and authorized to sell the said cargo or so much of it as shall be necessary to liquidate and defray this obligation, and also all charges, costs and interest ruling at the port at which this obligation is made payable and refund to the owners, or their representatives, of said cargo any surplus thereof; and any and all legal or other expenses necessarily incurred in the enforcement of this bond shall be equally due and payable hereunto.

Under no circumstances shall any subsequent indebtedness of the said cargo or its owners in any way affect or cancel the efficiency of this Bond.

It is hereby further understood and agreed that the amount of the foregoing bond shall in no wise contribute toward Particular Average, and that the rate of exchange has been fixed at .....

Having signed and executed ..... Bonds, all of the same tenor and date, one of which being accomplished, the others to be void and of no effect.

WITNESS my hand and seal at ....., the day and year first above written.

SIGNED, SEALED and DELIVERED
in the presence of

..... (L. S.)
Agent for Cargo.

State of..... } *ss.:*
County of..... }

On this ..... day of ..... A. D. one thousand nine hundred and ....., before me personally appeared ....., Master of the ....., who acknowledged that as Agent for the above described cargo he duly executed the foregoing Respondentia Bond for the purposes therein named.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office.

.....
Notary Public.

SUPREME COURT OF THE UNITED STATES

No. 591.—October Term, 1897

Flint, Eddy & Co., Appellants, vs. George Christall & James Greig, Trustees, Appellees.	On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

(May 31, 1898)

This case comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The facts out of which the question arises are as follows:

On November 9, 1895, the British Steamship *Irrawaddy*, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped and supplied, and was seaworthy.

The vessel was relieved from the strand November 20 as the result of sacrifices by jettison of a portion of her cargo, of sacrifices and losses voluntarily made or incurred by the shipowners through the master and of the services of salvors.

The *Irrawaddy* then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo and the losses and sacrifices of the shipowner.

The respondent thereupon paid $4,483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the shipowner, which they refused to pay.

The District Court made a decree in favor of the Libellants, from which decree the respondent duly appealed to this court.

Upon these facts the court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the shipowner, who has exercised due diligence to make his vessel in all respects seaworthy, properly

manned, equipped and supplied, under the provisions of Section 3 of the act of February 13, 1893, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo?

Mr. Justice Shiras delivered the opinion of the court.

The answer we shall give to the question certified by the Circuit Court of Appeals must be determined by the meaning and effect which should be given to the act of February 13, 1893, known as the Harter Act. Admittedly, upon the facts conceded to exist in the present case, the owner of the ship has no right to a general average contribution from the cargo, unless such right arises from the operation of that act.

We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law, responsible to the co-contributors. We are not called upon either to trace the history of the rule, or to justify it as based on equitable principles, as it is conceded on both sides that such is the ordinary rule in the absence of statute or contract to modify it.

Nor is it necessary to inquire into the origin or nature of the law of general average. That has been so recently and thoroughly done in *Ralli* v. *Troop* (157 U. S. 386) that it is sufficient to refer to the opinion of Mr. Justice Gray in that case.

Not only is the shipowner excluded from contribution by way of general average when the loss arises from the ship's fault, but he is legally responsible to the owner of the cargo for loss and damages so occasioned. And it is the well-settled law of this court that a common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from responsibility for loss or damage arising from the negligence of the officers or crew; that it is against the policy of the law to allow stipulations that will relieve a carrier from liability for losses caused by the negligence of himself or his servants. (*Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397.)

Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy at the time of beginning her voyage, or that he has used his best efforts to make her seaworthy; and that his undertaking is not discharged because the want of fitness is the result of latent defects. (*Richelieu Nav. Co.* v. *Boston Ins. Co.*, 136 U. S. 408; *The E. J. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124.)

In this condition of the law the so-called Harter Act was approved on February 13, 1893 (Stat. vol. 27, chap. 105), wherein, after providing in the first and second sections that it shall not be lawful for any owner,

agent, or master of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to exempt himself from liability for loss or damage arising from negligence in the loading or proper delivery of such property, or to insert in any bill of lading any covenant or agreement whereby the obligations of the owner to exercise due diligence in manning and equipping the vessel, and to make such vessel seaworthy and capable of performing her intended voyage should be in anywise lessened, weakened or avoided, it was, in the third section, enacted as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from the danger of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The argument on behalf of the shipowner is clearly expressed by the learned judge of the District Court in the following terms:

"There is no doubt, I think, that the liability to indemnify the cargo owner is the sole ground of the exclusion of the shipowner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation. It therefore seems necessarily to follow that in cases where all such liability is abolished by law, as it is under the circumstances of this case by the Harter act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average. Where due diligence has been exercised to make the ship seaworthy and a common danger arises upon the voyage by 'fault or error in the navigation or management of the ship,' the third section of that act declares that 'neither the vessel nor her owner, agent or charterer shall become or be held responsible for damage or loss resulting therefrom'; the previous liability of the shipowner to the cargo owner for faults of navigation is thus abolished in all cases coming within the act. In such cases faults in the navigation or management of the ship are no longer, by construction of law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo owner for his damages therefrom than the latter is liable to the shipowner for the resulting damages to the ship. Both are alike strangers to the fault and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice, voluntarily incurred, and for the common benefit as much and as truly so when made by the shipowner as when made by the cargo owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifice as the other.

The application of this new relation of non-responsibility under the Harter act to cases of general average does not, in fact, make the least change in the principles of general average contribution. The rule remains, as before, that he by whose fault, actual or constructive, the ship and cargo have been brought into danger cannot recover an average contribution for his expenses in extricating them. And so the counter rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue is entitled to an average contribution from what is thereby saved. Prior to the Harter act the shipowner, under our law, was constructively in fault for bad navigation and hence fell within the former rule. The Harter act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter." (82 Fed. Rep., 472, 474-477.)

We are unable to accept this view of the operation of the act of Congress.

Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel. But can we go further and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship?

Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the Federal courts to be contrary to public policy, and in this particular the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty.

Although the foundation of the rule that forbade shipowners to contract for exemption from liability for negligence in their agents and employees was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of courts to conform in their decisions to the policy so declared.

But we think that for the courts to declare, as a consequence of this legislation, that the shipowner is not only relieved from liability for the negligence of its servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. The act in question does, undoubtedly, modify the public policy

as previously declared by the courts, but if Congress had intended to grant the further privilege now contended for it would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the shipowner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew.

What was the reasoning on which the courts proceeded in holding it was against public policy to permit shipowners to contract for exemption from liability for the negligence of their agents? Was it not that such a state of the law would impel the shipowners to exercise care in the selection of those for whose conduct they were to be responsible? This being so, can it be reasonably inferred that Congress intended, when relieving shipowners from liability for the misconduct of their agents, to confer upon them the further right to participate in a general average contribution, and that to the detriment of the shippers? Such an interpretation of the statute would tend to relieve shipowners, to some extent at least, from care in the selection of the master and crew; and it would likewise operate to influence the master in deciding, in an emergency, whether he would make a case of general average by sacrificing the vessel, in whole or in part. If he knew that the owner would participate in a contribution occasioned by a loss, he would be the less likely to exert himself and crew to avoid the loss.

It is said that it has been decided by the English courts that when, by a contract in the bill of lading, the shipowner is exonerated from liability for loss caused by the fault of the master or crew, he is entitled to share in a general average contribution.

An examination of the cases cited has not convinced us that there has been any such final decision by the English courts. The case of *The Carron Park* (15 Pro. Div. 203) does, indeed, hold that the relation of the goods owner to the shipowner was altered by the contract; that the shipowner was not to be responsible for the negligence of his servants in the events which have happened; and that, therefore, the shipowner's claim for general average was allowed. On the other hand, in the case of *The Ettrick* (6 Pro. Div. 127), where the shipowner claimed the benefit of a general average contribution rendered necessary by reason of negligence in navigation, and put his claim on the ground that, having availed himself of the limited liability laws by paying into court the £8 a ton, which is the limitation fixed by the statutes of Great Britain, he was thereby relieved from his liability on account of the negligence in the navigation, and stood in the position of an innocent party entitled to share in the contribution. But the Court of Appeals held otherwise, and Sir George Jessel, M. R., said:

"The ground upon which the shipowner puts his claim is this: He says that the payment of £8 per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or his agents that would give rise to any

liability. But I cannot read the act so. All it says is that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. It does not give him any new rights as far as I can see. . . . It seems to me that he could have no such right, for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course there is an end of the case."

But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the shipowner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption.

Upon the whole, we think that, in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute.

Our conclusion accordingly is that the question certified to us by the Court of Appeals should be answered in the negative, and

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 220—October Term, 1911

*The Jason.** { On certificate from the United States Circuit Court of Appeals for the Second Circuit.

(May 13, 1912)

Cross libels were filed in the United States District Court for the Southern District of New York between the owner of the steamship *Jason* and the firm of Arbuckle Brothers, owners, and the Insurance Company of North America, insurers, of part of that vessel's cargo, to recover general average contributions. The District Court dismissed both libels. 162 Fed. 56. Upon appeal the Circuit Court of Appeals at first filed an opinion for affirmance (178 Fed. 414), but afterwards granted a rehearing, as a result of which the questions of law at issue were certified to this court as follows:

"*Statement of Facts.*

"The facts upon which the questions arise are these:

"On July 30, 1904, the Norwegian Steamship *Jason*, while bound on a voyage from Cienfuegos, Cuba, to New York, with general cargo, including 12,000 bags of sugar, consigned to Arbuckle Brothers, and insured with the Insurance Company of North America, stranded off the south coast of Cuba, through the negligence of her navigators. The steamship was seaworthy and was properly manned, equipped and supplied.

"The vessel was relieved from the strand on August 9 as the result of sacrifices by jettison of 2,042 bags of sugar (1,657 bags being the property of Arbuckle Brothers), of sacrifices and extraordinary expenditures voluntarily made or incurred by the shipowner through the master, and of the services of salvors specially employed. Said sacrifices and expenditures were necessary to relieve ship, cargo and freight from common peril. She then completed her voyage, and made delivery of the remainder of her cargo to the several consignees at New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters 'in accordance with established usages and laws in similar cases.'

"The bills of lading for all of the *Jason's* cargo contained the follow provision:

"'General average payable according to York-Antwerp Rules, and as to matters not therein provided for according to usages of port of New York.

* The docket title of the case is Actieselskabet "Jason" v. John Arbuckle et al.

"'If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness.'

"Both parties pleaded the bills of lading as constituting the contract of carriage.

"A general average adjustment was afterwards made in New York by Johnson & Higgins, adjusters appointed in the average bond. Both parties presented their claims to the adjusters for sacrifices made by them respectively for the common benefit and safety of the adventure. The adjusters allowed in the General Average account the compensation of the salvors, the sacrifices of cargo, and the sacrifices and extraordinary expenditures of the shipowner, and each of the interests was credited with such amounts as had been paid by it for the common benefit.

"The adjustment was prepared in accordance with York-Antwerp Rules, as provided for in the bill of lading, and otherwise in accordance with established usages and laws.

"The adjustment and apportionment of General Average, so made, showed a balance due from Arbuckle Brothers of $5,060.24, which the latter refused to pay. The grounds of such refusal were that the stranding resulted from the ship's negligence, and that the general average clause, above quoted, contained in the bills of lading is invalid.

"The original libel was filed by the owner of the *Jason* against Arbuckle Brothers, and its guarantor, the Insurance Company of North America, to recover this amount.

"Arbuckle Brothers and the Insurance Company of North America filed a cross libel to recover the sum of $3,506.50, which they alleged would be due them on an adjustment of the general average losses, if the shipowner's losses and sacrifices were excluded from the General Average account by reason of the fact that the stranding was caused by negligence of the ship's navigators. They claimed that the shipowner's sacrifices and extraordinary expenditures, made for the common benefit and safety of the adventure after the stranding, should not be allowed in the adjustment. If said sacrifices and expenditures should be excluded from the adjustment and the value of the ship should be taken account of as a contributory interest, the adjustment would show a balance in favor of Arbuckle Brothers.

"The District Court made a decree dismissing both libels, from which decree both parties duly appealed to this court.

Questions Certified.

"Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

"1. Whether the general average agreement above quoted from the bills of lading is valid, and entitles the shipowner to collect a general average contribution from the cargo owners, under the circumstances above stated, in respect of sacrifices made and extraordinary expenditures in-

curred by it subsequent to the stranding for the common benefit and safety of ship, cargo and freight.

"2. Whether, in view of the provisions of the third section of the Harter Act the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight.

"3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

"In accordance with the provisions of Section 6 of the Act of March 31, 1891, establishing Courts of Appeals, the foregoing questions of law are, by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court."

Mr. Justice Pitney, after stating the case as above, delivered the opinion of the Court.

That the facts present a case of general average within the meaning of the clause embodied in the bills of lading is entirely clear. There was a common, imminent peril involving ship and cargo, followed by a voluntary and extraordinary sacrifice of property (including extraordinary expenses), necessarily made to avert the peril, and a resulting common benefit to the adventure. *McAndrews* v. *Thatcher*, 3 Wall, 347, 365; *Star of Hope*, 9 Wall. 203, 228; *Ralli* v. *Troop*, 157 U. S. 386, 394.

The principal controversy is upon the question of the validity of the agreement that if the shipowner "shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped, and supplied," then, in case of danger, damage, or disaster resulting from (*inter alia*) negligent navigation, the cargo owners shall not be exempted from liability for contribution in general average, but with the shipowner shall contribute as if such danger, damage, or disaster had not resulted from negligent navigation. The facts show that the shipowner had fulfilled the condition imposed upon him by this clause; that is, he had "exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied." The question presented for solution turns upon the effect of the third section of the Act of Congress approved February 13, 1893, Ch. 105, 27 Stat. 445 (U. S. Comp. Stat. 1901, p. 2946), known as the Harter Act, and of the decision of this court in the case of *The Irrawaddy*, 171 U. S. 187.

Prior to the Harter Act it was established that a common carrier by sea could not by any agreement in the bill of lading exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 398, 438; following *Railroad Co.* v. *Lockwood*, 17 Wall. 357.

But of course the responsibilities of the carrier were subject to modification by law, and with respect to vessels transporting merchandise from or between ports of the United States and foreign ports they were substantially modified by the Harter Act. The first three sections of this

enactment are pertinent to the present discussion and are set forth in full in the margin.*

Section 1 deals with the shipowner's responsibility for the proper loading, stowage, custody, care and delivery of the cargo, prohibits the insertion in any bill of lading of an agreement relieving him from responsibility for negligence in respect to these duties, and declares such agreements null and void. Section 2 prohibits the insertion in any bill of lading of an agreement lessening or avoiding the obligation of the shipowner to "exercise due diligence (to) properly equip, man, provision and outfit said vessel and to make said vessel seaworthy," etc. Section 3 proceeds to limit the responsibility of a shipowner who shall have exercised due diligence to make his vessel seaworthy and properly manned, equipped and supplied. Instead of merely sanctioning covenants and agreements limiting his liability, Congress went further and rendered such agreements unnecessary by repealing the liability itself, declaring that if the shipowner should exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped and supplied, neither the vessel, her owner or owners, etc., should be responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel, etc., etc. The antithesis is worth noting. Congress says to the shipowner: "In certain respects you shall not be relieved from the responsibilities incident to your public occupation as a common carrier, although the cargo owners agree that you shall be relieved; in certain other re-

* The title and first three sections of the Harter Act are as follows:

"An act relating to navigation of vessels, bills of lading and to certain obligations, duties, and rights in connection with the carriage of property.

"Be it enacted, etc., that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

"SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port of the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act of omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

spects (provided you fulfill conditions specified) you shall be relieved from responsibility, even without a stipulation from the owners of cargo."

In the case now before us it is argued in behalf of the shipowner that, since by the third section of the Harter Act he is absolved from responsibility for the negligence of his master and crew under the circumstances existing, there is nothing in the policy of the law to debar him from bargaining with the owners of cargo for a participation in the general average contribution. In behalf of the cargo owners it is insisted that the construction placed upon the legislation in question by this court in *The Irrawaddy,* 171 U. S. 187, leaves the shipowner still disabled from making an agreement with the cargo owners for a participation with them in general average contributions resulting from negligent navigation or management of the ship by its master and crew.

The latter view was adopted by the district court in *New York & Cuba Mail S. S. Co.* v. *Ansonia Clock Co.,* 139 Fed. 894, where a clause identical with the one now under consideration was held invalid. This decision was apparently followed, although not cited, by the same court (162 Fed. 56), and by the Circuit Court of Appeals (178 Fed. 414, 416), in the case now under review. In reaching this result the courts below have, as we think, misconceived the effect of the language used by Mr. Justice Shiras, speaking for this court, in *The Irrawaddy,* and have given to that decision an import quite beyond its legitimate scope. In that case there was no agreement between shipowner and cargo owner respecting general average, nor respecting the consequences of a stranding or other peril that might result from the negligence of the master or crew of the vessel. On familiar grounds, all of the expressions employed in the opinion are to be construed in the light of the facts of the case and the question actually presented for decision. This was, whether § 3 of the Harter Act, *proprio vigore,* gave to the shipowner, under the circumstances, a right to general average contribution for sacrifices made by him subsequent to the stranding of the vessel in successful efforts to save her and her freight and cargo. It was pointed out in the opinion that previous to that enactment, in the case of a loss arising from the ship's fault, the shipowner was excluded from contribution by way of general average, and was also legally responsible to the owner of the cargo for loss and damage so occasioned; and that it was against the policy of the law to allow stipulations that would relieve a carrier from such liability. It was, however, recognized that it was "competent for Congress to make a change in the standard of duty." It was remarked that by the first and second sections of the Harter Act shipowners were prohibited from inserting in their bills of lading agreements limiting their liability in certain respects, and that the third section by its own terms limited their liability in other respects. The opinion, after stating that as the law stood before the passage of the act the shipowner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in officers and crew, and that in this particular the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who might so contract, proceeded to say that "Congress thought fit to remove the disadvan-

tage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty."

This language is laid hold of as indicating that the decision proceeded upon the ground that Congress thought it improper to permit owners of vessels to contract for exemption from liability. What it really means, as will be observed, is, that Congress went further, and by its own enactment exempted them from liability, under given conditions, for the consequences of faulty navigation.

The point of the decision in *The Irrawaddy* (and as an authority the case goes no further) is that while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence.

It is, however, further insisted in behalf of the cargo owners that the agreement in question is contrary to public policy in another respect, namely, in that it attempts to relieve the shipowner from one of the essential duties arising out of the relation of carrier and shipper, and from which the Harter Act has not relieved him. The argument is that although that act exempts him from the consequences of the negligent stranding, it leaves him still under the duty and obligation of caring for and preserving the cargo, after the stranding; that whenever the safety of the property entrusted to the shipowner is menaced, whether the peril be occasioned by *vis major* or by fault, and whether such fault be or be not of such character as to fall within the third section of the Harter Act, "the master is nevertheless bound to exert every effort to save the property, and if he fail in this duty his owners are liable to the cargo for the resulting loss." If by "every effort" is meant every *reasonable* effort, we see no occasion to question the soundness of the reasoning. But it is further insisted that the duty of the master to save the imperiled property extends so far as to call for a sacrifice of a part of the owner's property if necessary to save the cargo. In our opinion, the master's duty, as agent of the owner, is not so extensive. If it were, there would be an end at once of all contribution in general average for ship's sacrifices, for such sacrifices could not be deemed voluntary and extraordinary, if made in performance of the owner's general duty to his cargo.

The cases cited do not support the contention of counsel for the cargo owners in this behalf. *Propeller Niagara* v. *Cordes*, 21 How. 7, 28, holds that although the vessel be stranded "the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is *no more than a prudent man would do* under like circumstances." *The Maggie Hammond*, 9 Wall. 435, 458, holds that when the vessel is wrecked or otherwise disabled in the course of the voyage and cannot be repaired without too great delay and expense, it is the duty of the master to tranship the goods and send them forward, if another vessel can be had in

the same or a contiguous port or within a reasonable distance, and that upon so doing he is entitled to *charge the goods with the increased freight* arising from the hire of the vessel so procured. In *Star of Hope,* 9 Wall. 203, 230, it is pointed out that the duty imposed upon the master, in case of a peril arising to the common adventure, is "to judge and determine at the time whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder." The duty to make a sacrifice of such portion of the associated interests as in the judgment of the master will save the common adventure is obviously inconsistent with the suggested duty to first sacrifice the owner's property for the safety of the cargo. The other cases cited upon this point require no mention.

In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated.

The second question is whether, under the like circumstances, the cargo owners can recover contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight.

This question was dealt with in *The Strathdon,* 94 Fed. 206; 101 Fed. 600; 41 C. C. A. 515; where, however, there seems to have been no general average clause such as we have in the case before us; and by the same courts in this case, 162 Fed. 56; 178 Fed. 414; where the general average clause was dealt with as invalid, and therefore, of course, was given no influence in the determination of the present point. The Circuit Court of Appeals expressed the view that if the cargo owner were allowed to obtain indirectly, through a general average adjustment, compensation for losses attributable to the faulty navigation of the ship, and which therefore he could not recover directly because of section 3 of the Harter Act, the result would be a judicial repeal of that section, and that therefore the cargo owner could not bring the shipowner as a contributing interest into a general average adjustment that might result in a claim which the Harter Act disallows. With this view we have no present concern, because it seems to us that the response we are to make to the second question certified must depend upon the construction of the agreement between the parties. Having already held that the general average clause contained in the bill of lading is valid as against the cargo owner, it follows *ex necessitate* that it is valid in his favor; indeed, no ground is suggested for disabling the shipowner from voluntarily subjecting himself or his ship to liability to respond to the cargo in an action or in a general average adjustment, for the consequences of the negligence of his master

or crew, even though by the Harter Act he is relieved from responsibility for such negligence. Therefore we have only to determine whether by the language of the general average clause the cargo owners are entitled to contribution from the ship for sacrifices of cargo made subsequent to the stranding for the common benefit and safety. The language is that in the circumstances presented "the consignee or owners of the cargo shall not be exempted from liability for contributions in general average, or for any special charges incurred, but with the shipowner shall contribute in general average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such default, negligence," etc. This language clearly imports an agreement that the shipowner shall contribute in general average. The opposite view would render the clause inconsistent with the principles of equity and reciprocity upon which the entire law of general average is founded.

The foregoing considerations compel a negative answer to the third question. In view of the valid stipulations contained in the bill of lading, it would be a contradiction of terms to permit the cargo owners to recover contribution from the ship in respect of general average sacrifices of cargo, without on their part contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose. This would not be general average contribution, the essence of which is that extraordinary sacrifices made and expenses incurred for the common benefit and safety are to be borne proportionately by all who are interested.

Our conclusion, accordingly, is that, of the questions certified to us by the Circuit Court of Appeals, the first question should be answered in the affirmative, the second question should be answered in the affirmative, and the third question should be answered in the negative, and it is

So ordered.

GENERAL INDEX

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